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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 660

UNION PRODUCING COMPANY,

Petitioner,

vs.

MRS. MINNIE E. WHITE, JOAB TURNER BROOCKS, MRS. FRANK BROOCKS, AND MRS. WALTER TROUT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To this Honorable Court:

Your petitioner, Union Producing Company (Appellant in the court below), respectfully presents this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on the 17th day of September, 1946 (Holmes, Waller and Lee, Circuit Judges, sitting) (Tr. # 2, p. 193).

Petition for rehearing was duly filed and denied by the Court on October 12, 1946 (Tr. # 2, pp. 196, 212).

On application of petitioner, the issuance of the mandate of the Circuit Court of Appeals was stayed for thirty days from October 12, 1946, in order to afford petitioner an opportunity to apply to the Court for a writ of certiorari.

Summary Statement of Matter Involved

This case was originally filed on September 22, 1941, in the District Court of the United States for the Southern District of Mississippi, by Mrs. Minnie E. White, as plaintiff, a respondent here, against defendant, petitioner here, seeking to cancel for fraud, an oil, gas and mineral lease she executed to defendant on July 31, 1939 (Tr. #1, pp. 88-90), covering 4.8 acres undivided in 80 acres in Yazoo County, Mississippi, inherited from her divorced husband, W. H. Adcock, through her daughter (Tr. #1, pp. 2-7). The petition showed Mrs. White in October, 1940, eleven months before suit, sold to Walter Moring for $500.00 cash all her right, title and interest in the land. Petitioner filed motion to dismiss and contested her capacity as plaintiff (Tr. #1, p. 18) to cancel without owning any interest in the lands involved.

Intervening plaintiffs, respondents here, with Mrs. White's consent, came in, adopting her allegations, and setting up a deed from Moring to Stevens dated January 10, 1940, as origin of their title (Tr. #1, pp. 26-32). Petitioner contested their capacity to impeach for fraud allegedly practiced upon their grantor, a fraud action not being assignable (Tr. #1, pp. 36-37).

Petitioner, by permitted amendment, denied jurisdiction (Tr. #1, p. 72), contending, *inter alia,* that plaintiffs were suing Moring in the same court to remove as cloud his claim

that the deed from him to Stevens was a forgery (Tr. #1, pp. 47-68) Moring, by deposition in this cause, testified such deed was a forgery and that he claimed to be sole owner of the interest (Tr. #1, pp. 320-339). Petitioner contended Moring was an indispensable party, hostile to plaintiffs, whose joinder would destroy diversity and thus oust jurisdiction. All such pleas were overruled (Tr. #1, pp. 71-72).

On the merits, defendant denied fraud, and affirmatively pled ratification, waiver, release, estoppel, confirmation, and laches based upon expenditure of $63,960.09 as cost of drilling two wells without notice of claim from plaintiffs (Tr. #1, pp. 18-24, 36-41, 44, 45, 226).

Upon trial, petitioner got an instructed verdict (Tr. #1, pp. 365-366). Plaintiffs appealed to the Circuit Court of Appeals (Sibley, Holmes and Waller, Circuit Judges, sitting), which affirmed jurisdiction, but reversed and remanded for finding on fraud. (January 19, 1944, 140 Fed. 2d 176.) The opinion stated that plaintiffs "introduced ample evidence, if believed, to support a finding of actual fraud" (Tr. #2, p. 6).

Upon remand intervening plaintiffs were permitted to amend, adding the ground of accounting (Tr. #2, pp. 20, 21-22).

Upon re-trial, no new evidence being introduced, the court found fraud (Tr. #2, pp. 23-24). In response to defendant's motion to substitute findings of fact and conclusions of law, the trial court stated that such decision was "required to be made by the mandate of the Circuit Court of Appeals in its decision in this cause" (Tr. #2, p. 50).

Petitioner appealed, contending the decision was not that of the trial judge, but was compelled by the provision quoted above from the first opinion. The Circuit Court of Appeals (Holmes, Waller and Lee, Circuit Judges, sitting) on February 14, 1946 (153 Fed. 2d 856) reversed and re-

manded the cause, holding that it did not mean, by the quoted provision from the first opinion, to foreclose or direct the court's action on the issue of fraud, but intended to leave that issue wholly open; that the first appeal foreclosed all issues, including jurisdiction, raised by petitioner, except whether Moring was an indispensable party to an *accounting* suit (which it denied), and whether there was sufficient evidence under Mississippi law to show fraud (which it reserved pending decision below); and ordered consolidation with the case of *Broocks* v. *Moring* in the court below, being the suit by intervening plaintiffs against Moring in respect of Moring's claim of forgery. One Judge concurred, stating his belief that the evidence was legally insufficient to show fraud, and one Judge dissented (Tr. #2, pp. 76-84).

Plaintiffs, with permission, filed a second petition for rehearing, attaching thereto certified copies of proceedings in the case of *Broocks* v. *Moring*, wherein Moring withdrew his contest of the validity of the deed from Moring to Stevens (which he testified in this cause was a forgery), and confessed judgment in that cause (Tr. # 2, pp. 131-170) which was granted, 156 Fed. 2d 58). On September 17, 1946, the Court affirmed the trial court, cancelling petitioner's lease for fraud and granting a money judgment against defendant, holding that the provision quoted above from the first opinion (140 Fed. 2d 176), which it had held was not designed to constitute decision upon the sufficiency of the evidence (an issue reserved) (153 Fed. 2d 856), now foreclosed the issue, leaving open under Rule 52 (a) of the Rules of Civil Procedure only the question as to whether the trial court abused its authority in accepting credibility of the witnesses. Judge Waller, who filed the concurring opinion above noted (Tr. # 2, pp. 193-195) dissented.

Jurisdiction

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the Judicial Code (Title 28, Sec. 347 U. S. Code) and Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted Feb. 13, 1939, and amended March 25, 1940, and Oct. 21, 1940, providing for review on writ of certiorari of decisions of the Circuit Courts of Appeal.

Petitioner further shows that the Circuit Court of Appeals has rendered its decisions herein on important questions of local law in a way which conflict with the applicable local decisions, that is, the decisions of the Supreme Court of the State of Mississippi, which are controlling on the issues; and also has decided a question of general law in conflict with the weight of authority. Section 4 (b) Revised Rules of the Supreme Court, *supra*; *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. Rep. 817, 82 L. Ed. 1188.

Petitioner further contends that the decision of the Circuit Court of Appeals as to capacity of plaintiffs and jurisdiction of the court is violative of the decisions of this court and other Federal courts, including its own, in that capacity of the plaintiffs and jurisdiction of the Court must and can only be determined on the existence of things at the inception of the cause; that the original plaintiff, having no interest whatever in the land at the date of the suit, was without right to maintain a suit to cancel for fraud; that the intervening plaintiffs, exhibiting no prior, independent, equitable right in the premises, cannot, by claimed privity of estate only with the original plaintiff, maintain a suit for fraud allegedly practiced upon her as their mesne grantor; that necessity of Moring's joinder could only be determined upon the cause for cancellation alleged by the original bill, whereby failure to join him, claiming sole ownership, ren-

dered defendant subject in this cause to a decree of cancellation while leaving it bound in Moring's absence upon the contract of the lease to Moring: a result inconsistent with equity or justice. Petitioner further contends that the amendment, after the first appeal, by the intervening plaintiffs, adding a cause for accounting, could not obviate lack of jurisdiction existing on the original bill in respect of a suit to cancel, nor confer jurisdiction, if it did not exist originally. Petitioner further contends that pendency of this cause until intervening plaintiffs were able to effect a composition with Moring was tantamount to permitting the intervening plaintiffs and Moring, by agreement *inter sese*, to confer jurisdiction upon the court, contrary to the rule that jurisdiction cannot be conferred by consent.

Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in holding that the original plaintiff, Mrs. White, had capacity to maintain the cause for cancellation of defendant's lease for fraud, because the bill showed that prior to the filing thereof she had conveyed to Moring all of her right, title and interest in the lands involved.

(2) The Circuit Court of Appeals erred in holding that intervening plaintiffs as mesne grantees of Mrs. White could maintain a suit to cancel defendant's lease for fraud allegedly practiced upon Mrs. White because fraud is not a vendible chose, and it is against public policy to permit one to assign a cause of action for fraud or to permit a grantee, not exhibiting a prior, independent, equitable right in the premises, to maintain a cause for fraud.

(3) The Circuit Court of Appeals erred in refusing to follow the decisions of this Court and the weight of authority generally in other Federal Courts, in holding that Walter Moring was not an indispensable party whose joinder would destroy diversity and thus oust jurisdiction, because the uncontradicted record shows that he claimed an interest of such a nature that a final decree in a suit to cancel for fraud could not be made without either affecting his interest or leaving the controversy in such a condition that its final determination would be wholly inconsistent with equity and good conscience.

(4) The Circuit Court of Appeals erred in holding, contrary to the substantive law of Mississippi as laid down by the Supreme Court of Mississippi, by which it is bound and concluded, that the evidence of fraud in this case was either clear and convincing, or met the test of the Mississippi requirements.

(5) The Circuit Court of Appeals erred in holding that Mrs. White and her assigns were not precluded, as a matter of law, even if there were fraud, from any recovery by virtue of her receipt and retention in her possession, her endorsement and cashing of defendant's check, given her on execution of the lease, which showed upon its face that it was the consideration for the execution of the oil, gas and mineral lease involved herein.

(6) The Circuit Court of Appeals erred in holding contrary to the substantive law of Mississippi by which it was bound as laid down by the opinions of the Supreme Court of Mississippi that plaintiffs had not ratified petitioner's lease, or that they were not estopped as a matter of law to assert any claim of invalidity.

(7) The Circuit Court of Appeals erred in holding that the acts of plaintiffs in sitting by, while knowing, and per-

mitting petitioner to risk its money to drill two oil and gas wells and remaining silent until said wells were demonstrated to be good wells, did not, as a matter of law, constitute laches and inequity, barring any rights of plaintiffs for recovery.

Reasons Relied On for the Allowance of the Writ

The following reasons for allowance of the writ apply to each of the seven questions presented above in their order:

(1) The original bill showed that Mrs. White, before suit, had conveyed all of her right, title and interest to one Moring. The Circuit Court of Appeals on both appeals (opinion of January 19, 1944, and February 14, 1946) held that to be the effect of such deed.

It is elementary that a suit must be brought and prosecuted by the real party at interest. Thus, Mrs. White, owning no interest whatever in the lands and premises involved could not maintain a cause for cancellation as for fraud. Rule 17 (a) of the Federal Rules of Civil Procedure, and the rules of decision in many adjudicated cases which will be cited in the brief which follows this application.

(2) The intervening plaintiffs claimed title under Moring, grantee of Mrs. White. It has long been the rule of this Court that a cause of action for fraud is unassignable, because contrary to public policy, and that a subsequent purchaser cannot set up the alleged fraud of the first grantee to defeat his title; so that the holding of the Circuit Court of Appeals that plaintiffs in this case could maintain a suit for cancellation for fraud is directly contrary to the holdings of this Court, and is contrary to the great weight of decisions in many adjudicated cases which will be cited in the brief which will follow this application.

(3) The original petition, claiming fraud on Mrs. White, showed Walter Moring to be the true owner. It rested jurisdiction upon diversity of citizenship. Intervening plaintiffs claimed title by virtue of a deed from Walter Moring to A. L. Stevens, (Mrs Walter Trout in this record). In the same court, Joab Turner Broocks, respondent here, as Trustee for Mrs. Trout and Mrs. Frank Broocks, respondents here, sued Moring to cancel his claim that the alleged deed to Stevens (Trout) was a forgery. Moring testified in this cause, by deposition, that it was a forgery. Petitioner contended that Moring's interest was thus necessarily adverse to the plaintiffs. The Circuit Court of Appeals in its second opinion (February 14, 1946) said that the suit of *Broocks* v. *Moring* showed that intervening plaintiffs had taken the position, at least, that Moring's claim was a cloud upon their title. Moring, asserting sole ownership, was an indispensable party because the court could not proceed to determine the equitable right of cancellation without necessarily adjudicating upon his material claim and interest in his absence. Mrs. Walter Trout and Moring were citizens of Texas. His joinder would destroy diversity and thus oust jurisdiction. The Circuit Court of Appeals in its first opinion (January 19, 1944) in a footnote stated agreement with the ruling that Moring was not an indispensable party to cancellation.

Petitioner contended cancellation would not bind Moring so that if he were adjudged the true owner; defendant would be in the unconscionable position of having the lease cancelled and an adjudicated obligation owing to intervening plaintiffs while bound on the lease contract to Moring, so that not to join Moring and to proceed in his absence was contrary to equity and good conscience. The holding that Moring was not an indispensable party defendant, with

consequent ouster of jurisdiction, is in direct conflict with numerous decisions of this Court, and with decisions of the Fifth Circuit Court of Appeals set forth in the brief following this application.

(4 and 5) The Supreme Court of Mississippi in *Railroad* v. *Turnbull,* 71 Miss. 1029, 16 So. 346, held that evidence to sustain a judgment of fraud must be "clear, convincing and *indubitable*". Petitioner contends that the decision of the Circuit Court of Appeals is contrary to that rule of decision, since the evidence in this case is not, and is not held by that court to be, "indubitable".

In the case of *Trucker's Exchange Bank* v. *Conroy,* 190 Miss. 242, 199 So. 300, the Supreme Court of Mississippi held that where plaintiff does not accurately remember the location on the instrument of matter material to the existence of fraud, there could be no satisfactory proof of fraud, as a matter of law. In this case petitioner contended that Mrs. White's testimony that the signature of her cousin, Mrs. Malone, was immediately under her signature, whereas it was across and on the left hand side of the page (Tr. #1, p. 122-124), together with Mrs. White's testimony that there was no writing in pen and ink on the bottom half of the check at the time she presented it to the bank for cashing (Tr. #1, p. 97-98), whereas the writing on the check with the bank stamp thereon is conclusive proof to the contrary (T. #1, p. 93) are within the express prohibition of this rule of substantative law so that the decision of the Circuit Court of Appeals is in direct conflict therewith.

The Supreme Court of Mississippi, in *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 42, held that if the plaintiff had an *opportunity* to examine, which examination would have disclosed the truth, plaintiff, under such circumstances, was not entitled to recover. Mrs. White admitted that petitioner's agent told her she could read the instrument if

she wanted to but she refused (Tr. #1, p. 85). The decision of the Circuit Court of Appeals is in direct conflict with such holding.

Mrs. White testified that she kept the $5.00 check of petitioner with the writing on the bottom reciting consideration for execution of the lease (Tr. #1, p. 93) from July 31, 1939, until she cashed it at the Bank in Jackson, Mississippi, on August 4, 1939, without looking at it, but denied there was writing on the bottom (Tr. #1, p. 86-87), (Tr. #1, p. 97-98, 134-135, 175). She thus had full and untrammeled opportunity to examine the check which examination would have destroyed any deceit. Petitioner contends the holding here conflicts with the rule in Mississippi that where the means of information are equally accessible to both parties, the one is charged with knowledge thereof, and does not have the right to rely upon the representations of the other. Cases establishing these rules will be cited and discussed in the brief to be attached hereto. Petitioner contends that *Hunt* v. *Sherrill* (1943) 195 Miss. 688, 15 So. 2d. 42, repudiates the holding of the cases cited by the Circuit Court of Appeals in footnote 3 of its first opinion (T. # 2, p. 6).

In *Metropolitan Life Insurance Co.* v. *Hall,* 152 Miss. 413, 118 So. 826, the Supreme Court of Mississippi held that there is a *prima facie* presumption that all persons act honestly so that there is thus a legal presumption against fraud. Petitioner contends that the court below and the Circuit Court of Appeals refused to abide by this rule and to accord same to the defendant.

(6) The deed from Moring to Stevens expressly stipulated the same to be subject to any valid and subsisting oil, gas or mineral lease or leases on the land, and conveyed proportionate parts of royalties and other benefits accrued or to accrue under said leases.

Petitioner contended the lease from Mrs. White to it dated July 31, 1939, being at worst voidable, and the lease from Mrs. J. G. Harris purporting to cover the entire tract out of which comes the lands here involved (Tr. #1, p. 10-17) were each and both of record at the time and were thus expressly within *Cummings* v. *Mid-States Oil Corp.*, 9 So. 2d, 648, in which the Supreme Court of Mississippi held that such provisions and recitals constituted adoption, ratification and confirmation and estopped the parties from asserting any invalidity. Petitioner contends the holding of the Circuit Court of Appeals is in direct conflict with such holding.

(7) The Circuit Court of Appeals held defense of laches would not exist in favor of one charged with a fraud. (First opinion, January 19, 1944) (Tr. #2, p. 7-8). Petitioner contended that defense is available in a case of fraud, and that it is even more rigidly enforced in a case involving minerals because of the nature of minerals, so that time is measured by hours and days rather than by months and years. Thus, such holding violates the rules of decision in many adjudicated cases both from Mississippi and from Federal and other jurisdictions cited in the brief which follows this application.

WHEREFORE, petitioner for the reasons heretofore given and hereafter argued in the brief in support of this petition for review, respectfully prays that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said Court to certify and send to this Court a full and complete transcript of the record herein, bearing the Circuit Court of Appeals Docket numbers 10,690 and 11,432 to the end that this case may be reviewed and decided by this Court as provided by law; and that the judgment and decision of

the Circuit Court of Appeals be reversed, with directions to remand the same to the District Court with instructions to dismiss the bill and petition of the plaintiff and intervening plaintiffs with prejudice, or upon such terms as this Court may direct, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

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FIELDING L. WRIGHT,
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BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI

The following argument is offered on each of the seven questions presented, as set forth in the foregoing petition, in their order.

1. The Circuit Court of Appeals erred in not holding that the original plaintiff, Mrs. White, was without capacity to maintain the suit, and in not ordering the same dismissed.

The original bill filed by Mrs. White on September 22, 1941, alleged that theretofore, on October 17, 1939, Mrs. White had sold her entire interest to Walter Moring (Tr. #1, pg. 4). The Circuit Court of Appeals in both opinions found that Mrs. White, prior to the institution of suit, had conveyed all of her title to this property.

In *McCalla* v. *Bane* (C. C. D. Or. 1891) 45 Fed. 828, app. dismissed, 12 S. Ct. 984, 145 U. S. 646, 36 L. Ed. 854, plaintiff, who sought cancellation, had conveyed all interest before suit. In an unusually clear statement the Court said:

> "But if the fact were otherwise and these deeds were void, by this conveyance she has divested herself of all interest in the property, and, therefore, cannot maintain this suit. When she commenced her suit, she had no interest in the subject-matter. Argument cannot make this matter plainer than the language of her deed."

Rule 17(a) of the Federal Rules of Civil Procedure requires that all cases shall be prosecuted by the real party in interest. Mrs. White could not be the real party in interest. If she owned no interest in the property, she had no right or power in the property whatever which gave her authority to cancel any instrument affecting the property. In *9 Corpus Juris p. 1224,* it is represented to be the general rule from

the weight of authority everywhere that one without interest in the subject matter is not entitled to rescission or cancellation.

Petitioner contends that Moring, by privity of estate, succeeded to all rights, privileges and estate which Mrs. White had owned in respect of its oil, gas and mineral lease. He, alone, then had the sole right to enforce or contest the propriety of petitioner's performance of such lease contract. It would be an intolerable situation if a person having no connection whatever with the title had authority, upon any ground, to interfere with the continuing existence of contracts or instruments affecting that property.

2. Plaintiffs had no capacity to cancel for fraud allegedly practiced upon their mesne grantor.

The intervening plaintiffs asserted title by virtue of the conveyance from Moring to Stevens (Tr. #1, p. 27, 30-32).

Such deed is dated January 10, 1940, so that the origin of the intervening plaintiffs' title bears date subsequent to the date of the alleged fraud on July 31, 1939. Being intervenors, they had to take the case as they found it, and they recognized it by adopting the allegations of Mrs. White and tendering only the issue of cancellation as for fraud.

It has long been the rule that a cause of action for fraud is unassignable, because contrary to public policy. *Traer* v. *Clews,* 115 U. S. 528, 6 S. Ct. 159, 29 L. Ed. 467; *Graham* v. *LaCrosse,* 102 U. S. 148, 26 L. Ed. 106; *Jones* v. *Comer* (S. Ct. of W. Va.) 13 S. E. 2d, 578; *United Zinc Co.* v. *Hardwood,* 216 Mass. 474, 103 N. E. 1037; *Booth* v. *Green Inv. Co.* (D. C. N. D. Okla. 1934) 7 Fed. 567; *Davis* v. *Robodeaux* (S. Ct. Okla.) 97 Okla. 86, 226 Pac. 990; *Cochran Timber Co.* v. *Fisher* (S. Ct. Mich.), 190 Mich 478, 157 N. W. 282;

Volunteer St. Life Ins. Co. v. *Powell-White Company* (Ga.), 1 S. E. 2d. 662; *Bozeman* v. *Cox*, 66 Ga. 67; *Puffer* v. *Welch* (S. Ct. Wis.), 144 Wis. 506, 129 N. W. 525.

An unusually clear statement of the rule is contained in the case of *Graham* v. *LaCrosse, supra*, wherein Mr. Justice Bradley said:

> "A deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only at the election of the grantor, and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up an alleged fraud of the first grantee to defeat his title; the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or inteerst capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right incapable of sale or transfer."

The inception of the rule was that fraud ought not to be a vendible chose since its sale was maintenance that would give rise to immorality, encourage additional fraud, and all of the evils that would consequently follow therefrom. If, however, the grantee had procured a prior independent equitable right, he thus had a vested interest which he was entitled to protect by exposing and destroying the fraud, and thus there was engrafted an exception on the rule. See *Wessenfelds* v. *Cable* (S. Ct. Mo.), 208 No. 515, 106 S. W. 1028; *Graham* v. *LaCross, supra*. Intervening plaintiffs had no prior, independent, equitable right.

The public policy against the assignment of a cause of action for fraud and the maintenance of suit thereon by an

assignee is so strong, and is so obviously in the public interest, it ought not to be subject to avoidance by any device whatever. The Circuit Court of Appeals was in error in holding this suit could be upheld as one to remove cloud or confirm title under Sections 404 or 405 of the Mississippi Code of 1930 (Tr. #2, p. 8, and footnote 12 thereon). Mrs. White, owning no title, could not have had any title upon which to confirm, or against which a cloud could be removed. However the suit might be designated, the inescapable fact remains that the sole purpose of the plea of intervention was to cancel petitioner's oil, gas and mineral lease for a fraud allegedly practiced upon Mrs. White. Petitioner respectfully presents that an examination of the pleadings, the record, and the several opinions of the Circuit Court of Appeals shows unquestionably that the same was treated and disposed of solely as a suit to cancel for fraud.

Petitioner contends that the fact that the plaintiffs were trafficking in the claim and assertion of fraud cannot be gainsaid and that they, having no capacity to maintain such a suit, the same should have been ordered dismissed both by the trial court and the circuit court of appeals.

3. There was no jurisdiction because Moring was an indispensable party whose joinder destroyed diversity and thus jurisdiction.

By Section 80 of 28 U. S. C. A. (Judicial Code, Sec. 37) it is statutorily required that when diversity fails the District Court shall proceed no further, but shall dismiss or remand, if the case was one which had been removed.

Federal Courts are courts of limited jurisdiction, and the presumption at every stage is against jurisdiction, unless the contrary affirmatively appears from the record. *Bors* v. *Preston*, 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419; *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444.

Both this court, the Circuit Court of Appeals for the Fifth Circuit, and other Federal Courts have held numerous times that persons who have an interest in the controversy of such a nature that a final decree could not be made without either affecting that interest or leaving the controversy in such a condition that its final determination would be wholly inconsistent with equity and good conscience, were indispensable parties who should be brought in unless so to do would destroy jurisdiction, and in that event the cause should be dismissed. The test of indispensability under the decided cases is not whether the decree is bound to affect injuriously the right of the absent party, but it is enough that the absence of such party *may* leave the controversy in such condition that the result would be inconsistent with equity and good conscience. *Shields* v. *Barrow*, 17 How. 130, 15 L. Ed. 158; *Minnesota* v. *Northern Securities Co.*, 22 S. Ct. 308, 184 U. S. 199, 46 L. Ed. 499; *Mallow* v. *Hinde*, 12 Wheat 193, 25 U. S. 193, 6 L. Ed. 599; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145; *Jose Ribon* v. *C. R. I. & P. Ry. Co.*, 83 U. S. 446, 16 Wall. 446, 21 L. Ed. 367; *Fourth National Bank of N. Y.* v. *The New Orleans & Carrolton Ry. Co.*, 11 Wall. 624, 78 U. S. 624, 20 L. Ed. 823; *Commonwealth Trust Company* v. *Smith*, 45 S. Ct. 26, 266 U. S. 152, 69 L. Ed. 219; *State of California* v. *Southern Pacific Company*, 15 S. Ct. 591, 157 U. S. 229, 39 L. Ed. 683; *Spanner* v. *Brandt* (D. C. S. N. D. Y.) 1 Fed. 555 (demonstrating that the rule of *Shields* v. *Barrow* continues under the Federal Rules of Civil Procedure); *Roos* v. *The Texas Co.* (2 C. C. A.) 23 Fed. 2d, 171; *C. M. & St. P. R. Co.* v. *Adams County* (9 C. C. A.) 72 Fed. 2d, 817; *Trimble* v. *John C. Winston Co.* (5 C. C. A.) 56 Fed. 2d, 150, certiorari denied, 52 S. Ct. 582, 56 U. S. 555, 76 L. Ed. 1289; *Edwards* v. *Glasscock* (5 C. C. A.) 91 Fed. 2d, 562; *Vincent Oil Co.* v. *Gulf Refining Co. of Louisiana* (5 C. C. A.) 195 Fed. 434; *Associated Oil Co.* v. *Miller* (5 C. C. A.) 269

Fed. 16, certiorari denied, 256 U. S. 697, 41 S. Ct. 537, 65 L. Ed. 1176; *Garretson* v. *Nat'l Surety Co.* (5 C. C. A.) 65 Fed. 2d, 874, certiorari denied, 54 S. Ct. 55, 290 U. S. 638, 78 L. Ed. 555.

The Fifth Circuit Court of Appeals in *Town of Lantanna, Florida,* v. *Hopper,* 102 Fed. 2d, 118, held: "if it should have appeared, at any time, after the suit was brought, that plaintiff * * * was not truly a party in interest and was collusively substituted for * * * the real party in interest, there was no diversity of citizenship and it was the duty of the district court to dismiss the case." Petitioner contends the same duty applied here. Mrs. White was not the real party in interest. The intervening plaintiffs claimed to be the real parties in interest, yet the record showed them locked in a death struggle with Moring to determine the real ownership. Mrs. White, after the intervening plaintiffs came in, was a figure-head, but chief witness. They, in truth, prosecuted the suit; their interest was hostile to Moring. There could be no diversity.

It is also well settled law that an amendment stating a cause of action which originally might be within the jurisdiction cannot be filed in order to give jurisdiction where no jurisdiction existed by the original bill. *City of Dawson* v. *Columbia Avenue Savings Funds, etc.,* 197 U. S. 178, 25 S. Ct. 420, 49 L. Ed. 713; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 27; *Anderson* v. *Watt,* 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078.

After the first appeal, the intervening plaintiffs, over objection of petitioner, were permitted to amend their intervening petition by adding a count for an accounting. Petitioner contends they could not thus amend and change the cause of action or the cast of the suit, being bound as interveners by the cast of Mrs. White's original petition never amended, and which sought only to cancel as for fraud;

yet the Circuit Court of Appeals, in its second opinion (153 Fed. 2d, 856) measured jurisdiction by the effect of such amendment, holding Moring was not an indispensable party to a suit for accounting. In the *City of Dawson* case, *supra*, Mr. Justice Holmes, for the Court, said:

> "The attempt, by an afterthought, to give jurisdiction by setting up constitutional rights (by way of amendment) must fail also. The bill presents a naked case of breach of contract."

Paraphrasing that language, if we may, it can be said that

> "The attempt, by an afterthought (on the part of the intervening plaintiffs), to give jurisdiction (where jurisdiction did not exist on the original cause) by setting up (an amendment adding a cause for accounting), must fail also. The bill presents a naked case of suit to cancel for fraud."

In *Anderson* v. *Watt, supra,* the amendment was to allege cancellation of an appointment as executor, which this court held could not be done and thereby exhibit jurisdiction.

Likewise petitioner contends that the continued pendency of this cause until such time as the intervening plaintiffs made a composition of their controversy with Moring (see the opinion granting the second petition for rehearing) (156 Fed. 2d, 58) had effect by the holding of the Circuit Court of Appeals to permit intervening plaintiffs and Moring to confer a jurisdiction upon the trial court and the Circuit Court of Appeals not theretofore existing.

4. The evidence of fraud in this case as a matter of law is insufficient to meet the test of the rule laid down by the Supreme Court of Mississippi, by which the Federal courts are bound.

Petitioner contends that under the rule of *Erie Railway Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,

the Circuit Court of Appeals and the District Court were bound to follow the law as laid down by applicable decisions of the Supreme Court of Mississippi. The general rule in Mississippi is that fraud must be proven by evidence which is clear and convincing. *Granada Auto Co.* v. *Waldrop,* 188 Miss. 468, 195 So. 491; *Trucker's Exchange Bank* v. *Conroy,* 190 Miss. 242, 199 So. 301; *Metropolitan Life Insurance Co.* v. *Hall,* 152 Miss. 413, 118 So. 826; *Harris* v. *Godbold,* 21 So. 2d, 149; *Railroad* v. *Turnbull,* 71 Miss. 1029, 16 So. 346; *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 426; *Southern Development Co.* v. *Silva,* 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678.

"Clear and convincing" must be more than a "mere preponderance". *Martin* v. *Gill,* 182 Miss. 810, 181 So. 849. In *Railroad* v. *Turnbull, supra,* the Mississippi Supreme Court said that to be clear and convincing evidence must be "indubitable." The Circuit Court of Appeals for the Fifth Circuit in examining the meaning of the requirement under the Mississippi rule in *United States* v. *City of Brookhaven,* 134 Fed. 2d 442, said that to be clear and convincing the proof must be "decisive."

An examination of the letter opinion of the trial court setting forth his decision to find fraud (Tr. #2, p. 23-24) would appear to permit only the conclusion that that court could not and did not consider the evidence clear and convincing, indubitable or decisive; but rather than it was "difficult to determine" that Mrs. White's testimony was tainted with the suspicion of "caution" because of interest; that Gibson, petitioner's agent, was interested to the extent that he was charged with fraud and an employee of petitioner; that Mrs. Malone was the only disinterested witness other than relationship and it would be unreasonable to presume she would perjure herself for benefit of a cousin. Petitioner submits that necessity of such mental peregrina-

tion is incompatible with the certainty of conviction compelled by evidence that is indubitable and decisive.

Analysis of testimony of Mrs. White and Mrs. Malone shows them to be in serious conflict on almost every material matter bearing upon the issue of fraud. Mrs. White's testimony, itself, is full of contradictions, conflicts and impeachment.

In *Trucker's Exchange Bank* v. *Conroy, supra,* a fraud case, the Supreme Court of Mississippi said:

> "One has but to consider the testimony of the appellee to arrive intuitively and confidently at the conclusion that it cannot be safely accepted and acted on, particularly in support of such a grave charge as the one here; for it is manifest therefrom that the *appellee does not accurately remember the contents of the deed* of trust, and was mistaken in thinking she does. For instance, she was evidently mistaken in saying that the jewelry was not listed on the back of the note but was included in the property described in the deed of trust, and had she read the deed of trust as carefully as she now thinks she did, she would have discovered that it covered, as it evidently did, real property which she did not own and which she says she did not intend to include therein. *No verdict based on this evidence should be permitted to stand;* consequently, the court below should have granted the appellant's request for a directed verdict, as to which, *on the evidence there is 'no room for doubt.'* Perry *v.* Clark, 8 How 495, 500, and numerous other cases cited in 14 Mississippi Digest, Trial, Key 139." (Emphasis ours.)

Mrs. White and Mrs. Malone both declared the signature of Mrs. Malone as a witness on the co-lessor's agreement was under Mrs. White's signature on the right hand side of the page, and not on the left hand side of the page, where the instrument showed it to be under Mr. Gibson's signature (Tr. #1, p. 89, 122-124, 96-97, 166, 173-174.)

Again, Mrs. White testified unequivocally and categorically that she did not look at the $5.00 check and did not know what was on it (Tr. #1, p. 86-87, 97, 134-135, 175), yet positively stated there was no writing in pen-and-ink on the bottom half of the check at the time she presented it to the bank for cashing (Tr. #1, p. 97-98). There can be no truth whatever to this statement, and the paper itself is the proof (Tr. #1, p. 93) showing bank stamp when cashed across the writing on the bottom of the check. Petitioner contends that these two matters render testimony completely unacceptable, and are precisely within the prohibition of the case of *Trucker's Exchange* v. *Conroy.*

The Supreme Court of Mississippi in *Hunt* v. *Sherrill,* 195 Miss. 688, 15 So. 2d, 42, held that if plaintiff had *opportunity* to examine, he was charged at law with what such examination would reveal, and where it would reveal the truth, there could be no fraud. That case also decides that "where the means of information are equally accessible to both parties, the purchaser has no right to rely upon representations of the seller." Petitioner contends that the decision here is in direct conflict with *Hunt* v. *Sherrill,* because the Circuit Court of Appeals held that Mrs. White had the right to rely upon the representations allegedly made to her without making any inquiry (Tr. #2, p. 6), although the check and recorded lease giving correct information were within her reach, and because Mrs. White admitted that Mr. Gibson told her that she could read the co-lessor's agreement if she desired and she refused (Tr. #1, p. 85). Having opportunity, she is bound by what an examination would show. The rule of *Hunt* v. *Sherrill* has also been applied in *Pilot Life Ins. Co.* v. *Wade,* 153 Miss. 874, 121 So. 844; *New York Life Ins. Co.* v. *Gill,* 182 Miss. 816, 182 So. 109; *Wood* v. *Carpenter,* 101 U. S. 135, 25 L. Ed. 807. Petitioner says that the check given to Mrs. White with the

reading on the bottom cried out continuously while in her possession as to the falsity of the claimed representation.

Mrs. Malone testified that when Mr. Gibson told Mrs. White he was trying to locate the heirs to a certain piece of "oil land" Mrs. White "Cooled down" (Tr. 1, p. 165, 171). Mrs. White admitted she did not rely on Gibson but relied on her cousin, Mrs. Malone, and signed the co-lessor's agreement because Mrs. Malone told her to (Tr. #1, p. 82). Petitioner contends this admission destroys any possibility of fraud or reliance upon a representation, if made.

Recently, in *Koenig* v. *Calcote,* 25 So. 2d, 763, plaintiff sought to cancel a mineral deed for the fraudulent representation that it was represented to be a lease, whereas in truth it was a fee simple deed, and that plaintiff relied upon the representation and did not read the instrument. That is precisely like Mrs. White's allegation that the lease here was represented to be an affidavit. The Supreme Court of Mississippi in that case held that such allegation must show that the plaintiff was prevented from reading by a fraudulent device and artifice. Petitioner contends that there is neither allegation nor proof in this cause of a fraudulent artifice or device, precenting her from reading.

In the second opinion, the Circuit Court of Appeals (155 Fed. 2d, 856) (Tr. 2, p. 76-83) held that there was undecided in this cause the question of the sufficiency of the evidence to show fraud under the Mississippi rule. This question was reserved for decision, yet in its order and opinion of September 17, 1946, this position was abandoned without decision upon the ground, stated in the first opinion, that there was ample evidence, if believed, to support finding of fraud. The court held the only issue left was whether the trial court was warranted in believing. In the opinion of February 14, 1946, the Circuit Court of Appeals, referring to such statement in the first opinion said: "We did not

intend to indicate or suggest any opinion whatsoever as to whether fraud was or was not present." Again the Court said: "If our statement in the first opinion indicated to the court below that we thought that fraud was present, then this opinion should remove that impression and leave the court free to make findings on the issue of fraud strictly in accord with its own view of the evidence heretofore taken or that evidence supplemented in further trial" (Tr. #2, p. 82). In a specially concurring opinion Waller, C. J., then said:

> "I concur in the reversal and remanding of this case on the grounds stated, but I further believe that the evidence in this case fails to measure up to that clear and convincing standard necessary to establish fraud" (Tr. # 2, p. 82).

Petitioner contends, with respect, that the action of the court in abandoning that position and resting its decision upon a statement which it had just declared was not intended to mean what it now said, is not only extraordinary, but arbitrary. Petitioner was entitled to have the Circuit Court of Appeals measure the evidence against the yardstick of the Supreme Court of Mississippi, by whose decisions it is bound. Petitioner submits that opportunity of the trial judge to judge of credibility under Rule 52(a) of the Rules of Civil Procedure cannot take the place of affirmative evidence required to be clear, convincing, indubitable and decisive. Petitioner calls attention to the fact that Waller, C. J., dissented from the order and opinion of September 17, 1946.

Petitioner submits that the evidence in this case as a matter of law is insufficient to meet the test of the Mississippi rule, and that such insufficiency should be declared and the suit of plaintiffs dismisseed with prejudice.

5. The $5.00 check precluded Mrs. White, as a matter of law, from recovery, since she kept and retained it in her possession for several days, endorsed and cashed it, such check upon its face carrying notice to her, which as a matter of law prevented any deceit.

In the argument and brief under the proposition next preceding this, we have demonstrated the truth of this contention upon which we here rest, except to say that such bonus of $1.00 per acre was the then going price in Mississippi for oil leases.

6. Plaintiffs were estopped to assert any claim of invalidity.

Mrs. White's action with respect to the $5.00 check, petitioner contends, constituted ratification, waiver and confirmation on her part.

Intervening petitioners claimed title under the deed from Walter Moring to A. L. Stevens which contained this paragraph:

> "This conveyance is made subject to any valid and subsisting oil, gas, or mineral lease or leases on said land, including, also, any mineral lease, if any, heretofore made or being contemporaneously made from grantor to grantee; but, for the same consideration hereinabove mentioned, grantor has sold, transferred, assigned, and conveyed, and by these presents does sell, transfer, assign and convey unto grantee, his heirs, successors and assigns, the same undivided interest (as the undivided interest hereinabove conveyed in the oil, gas and other minerals in said land) in all the rights, rentals, royalties and other benefits accruing or to accrue under said lease or leases from the above described land; to have and to hold unto grantee, his heirs, successors and assigns."

The co-lessors agreement from Mrs. White to petitioner was filed for record August 1, 1939 (Tr. #1, p. 91), before execution of the deed from Moring to Stevens (Tr. #1, p. 30). It was constructive notice to plaintiffs. It was constructive notice to Moring, whose deed was dated October 17, 1939 (Tr. #1, p. 9).

Mr. Gibson testified that he had with him at the time he procured the lease from Mrs. White, the lease from Mrs. J. G. Harris (Tr. #1, p. 276, 10-17) which covered the 80 acres out of which the lands involved in this cause come. The Mrs. J. G. Harris lease had been of record since June of 1939 (Tr. #1, p. 10).

It is settled beyond peradventure that such a paragraph in the Moring-Stevens deed as a matter of law constitutes a ratification, adoption, and confirmation of petitioner's lease and estops plaintiffs as a matter of law from denying its valid existence. *Cummings* v. *Midstates Oil Corp.* (Miss. S. Ct.) 9 So. 2d, 648; *Grissom* v. *Anderson* (S. Ct. of Texas) 125 Tex. 26, 79 S. W. 2d, 619; *Humble Oil & Refining Co.* v. *Clark* (S. Ct. of Tex.), 126 Tex. 262, 87 S. W. 2d, 471; *Turner* v. *Hunt* (S. Ct. of Tex.) 131 Tex. 492, 116 S. W. 2d, 575, 587, 588; *Anderson* v. *Pioneer Bldg. & Loan Assn.* (Writ of error refused by Texas S. Ct.) 163 S. W. 2d, 421, 424.

The *Cummings* case, *supra,* passed upon a paragraph identical word for word with the paragraph quoted from the Moring-Stevens deed, and applied the rule. Petitioner contended that its lease was, at worst, voidable, and therefore was good until set aside.

The Circuit Court of Appeals for the Fifth Circuit approved the same rule, in the case of *Meeks* v. *Taylor,* 138 Fed. 2d, 458, certiorari denied, 321 U. S. 773, 64 Sup. Ct. 611, 88 L. Ed. 463, and again in the case of *Kennemer* v.

Bennington, 141 Fed. 2d, 555, certiorari denied, 65 S. Ct. 65, 89 L. Ed. 29. In the *Meeks* case, *supra,* it said:

> "There could be no rents and royalties unless the lease was enforced, and her conveyance of them necessarily meant that she adopted the lease and ratified it * * * a ratification once made may not be revoked."

Petitioner contends that the Circuit Court of Appeals was obligated to apply the same rule here by virtue of the decision of the Mississippi Supreme Court in the *Cummings* case, *supra.*

7. The plaintiffs were guilty of laches barring any right of recovery herein.

Petitioner drilled Well No. 1 at a total cost of $32,751.36, and Well No. 2 at a total cost of $31,208.73 (Tr. #1, p. 226). These wells were actually spudded in on August 27, 1940, and October 2, 1940, and respectively completed September 16, 1940, and October 19, 1940 (Tr. #1, p. 210), which was more than a year before this cause was originally filed (Tr. #1, p. 2-7). Petitioner was in visible possession during the drilling, all plaintiffs knew or were on notice about it, and Walter Trout, the husband of respondent Mrs. Trout, was on and off the premises during the course of drilling, watching it; but none gave notice of any claim to petitioner (Tr. #1, p. 110, 262, 263). So the plaintiffs sat by, permitted petitioner to risk its money and waited more than a year before filing suit in order to determine how valuable the wells were.

Laches applies where it will be practically unjust to give a remedy, either because the applicant has by his conduct done that which might be fairly regarded as a waiver of his remedy, or, by his conduct or neglect has, though

perhaps not waiving that remedy, yet, put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterward asserted. It is delay that works a disadvantage to another. *Comans* v. *Tapley,* 101 Miss. 224, 57 So. 567; *Vanlindingham* v. *Meridian Creek Drainage District,* 2 So. 2d, 591; Griffith's Mississippi Chancery Practice, Sec. 33. See also *Buckner* v. *Calcote,* 28 Miss. 432, cited with approval by this Court in *Johnston* v. *Standard Mining Co.,* 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480. In the *Johnston* case this Court said actual knowledge was not necessary, but that in weighing laches "the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put upon a man of ordinary intelligence the duty of inquiry." That duty was said to be all the more "peremptory" because the property was mining property subject to enormous increase in value. See also *Johnson* v. *Atlantic, Gulf and West India Transit Co.,* 156 U. S. 618, 15 S. Ct. 52, 39 L. Ed. 556; *Foster* v. *Mansfied,* 46 U. S. 88, 36 L. Ed. 899; *Winn* v. *Shugart,* 10 C. C. A., 112 Fed. 2d, 617.

In *Ware* v. *Galveston City Co.,* 146 U. S. 102, 13 S. Ct. 33, 36 L. Ed. 904, a case involving fraud, the duty to inquire arose because plaintiff "had *opportunity* to make inquiry of the company". In *Pearsall* v. *Silva,* 149 U. S. 239, 13 S. Ct. 833, 37 L. Ed. 713, a recorded deed was sufficient to produce inquiry. The Circuit Court of Appeals for the Fifth Circuit in the case of *Buchanan* v. *Pitts,* 111 Fed. 2d, 599, in an opinion written for that court by the Judge who presided over this case, *nisi,* held recordation was sufficient. In *Davidson* v. *Gray,* 105 Fed. 2d, 405, it was held that laches was applicable in the case of fraud.

Petitioner therefore contends that the refusal of the Circuit Court of Appeals to apply laches in this case involving

fraud was not only contrary to its own decisions, but expressly contrary to the decisions of this Court and of the Supreme Court of Mississippi, by which it is bound.

The cases dealing with mineral rights announce a rule even more stringent: This Court in the case of *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 592, 22 L. Ed. 328, said:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. *Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.*
>
> "'While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.'" (Italics ours.)

In *Murphy* v. *Johnston*, Tex. Civ. App. (Writ of error dismissed by the S. Ct. of Tex.), 54 S. W. 2d, 159, it is said:

> "• • • the diligence required is measured by months rather than years, each case depending on its own particular facts and circumstances. (citing cases.)
>
> • • • • • • •

> *"Appellants sat by and permitted the oil companies to expend large sums of money in developing and making the oil and gas property valuable; they therefore come clearly within the rule announced in the case of General Electric Co. v. Yost Electric Co., supra, to the effect that a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of the enterprise."* (Italics ours.)

See, also, *General Electric Co.* v. *Yost Electric Co.* (D. C.) 208 F. 718; *Holman* v. *Gulf Refining Company* (5 C. C. A.) (1936) 76 F. 2d, 94; *Heard* v. *Houston Gulf Gas Company* (5 C. C. A.) (1935) 78 F. 2d, 189, certiorari denied, 56 S. Ct. 178, 296 U. S. 643, 80 L. Ed. 457; *Davidson* v. *Grady* (5 C. C. A. 1939), 105 F. 2d, 405, rehearing denied, 106 F. 2d, 272, and cases therein cited; *Minchew* v. *Morris* (1922) (Dallas Court of Civil Appeals) 241 S. W. 215; *Reese* v. *Carey Bros. Oil Company* (1926) (Amarillo) (Writ of error dismissed by the S. Ct. of Tex.) 286 S. W. 307; *Gosnell* v. *Lloyd*, 215 Colo. 244, 10 Pac. 2d, 45; *Gill* v. *Colton* (4 C. C. A. 1926) 12 F. 2d, 531; *Hodgson* v. *Federal Oil & Development Co.*, 285 F. 546; *Scott* v. *Empire Land Co.* (D. C. Fla. 1925) 5 F. 2d, 873; *Johnston* v. *Standard Mining Co.* (1892) 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 16 S. Ct. 663, 40 L. Ed. 812; *Winn* v. *Shugart* (10 C. C. A. 1940) 112 F. 2d, 617; *Johnson* v. *Atlantic G. & W. I. Transit Co.* (1895) 156 U. S. 618, 15 S. Ct. 520, 39 L. Ed. 556.

Conclusion

WHEREFORE, petitioner respectfully submits that its petition for certiorari should be granted, and that upon con-

sideration of the case the decision of the Circuit Court of Appeals should be reversed and the District Court ordered to dismiss the plaintiffs' cause with prejudice, or that the cause be dismissed for want of jurisdiction.

Respectfully submitted,

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Of Counsel:
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THOMAS FLETCHER.

(7390)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 660

UNION PRODUCING COMPANY,

Petitioner,

versus

MRS. MINNIE E. WHITE, JOAB TURNER BROOCKS, MRS. FRANK BROOCKS, AND MRS. WALTER TROUT,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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JOHN SATTERFIELD.

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TO THIS HONORABLE COURT:

Your respondents, Mrs. Minnie E. White, Joab Turner Broocks, Mrs. Frank Broocks and Mrs. Walter Trout, respectfully present this response in opposition to the petition for writ of certiorari filed by petitioner, Union Producing Company, and in support of the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in said Court on September 17, 1946.

PRELIMINARY STATEMENT.

This suit was filed in the District Court on September 22, 1941, and has been in continuous litigation for more than five years. There have been two trials in the District Court and two appeals to the Circuit Court of Appeals for the Fifth Circuit. Throughout the course of these proceedings, all features of the case have been fully presented and exhaustively briefed and argued by both sides.

The original complaint was filed by respondent, Mrs. Minnie E. White. The complaint sought to have a so-called co-lessor's agreement, under which petitioner claimed the rights of a mineral lessee, adjudged invalid and cancelled as a cloud upon the title to an undivided 4.8 acres in an 80-acre tract of land in Yazoo County, Mississippi. This co-lessor's agreement purported by its terms to have Mrs. White join in an oil lease on the eighty-acre tract which had previously been executed by co-owners not herein involved. The basis of the complaint was the fraud of petitioner's agent, R. F. Gibson, in the procurement of the instrument (Tr. 1, pp. 2-18).

Shortly after the filing of the original complaint, the remaining respondents herein, by leave of court, intervened, alleging by their petition that they were the owners of the interest of Mrs. White, subject to an oil payment of $5,000.00 retained by and due Mrs. White (Tr. 1, pp. 26-36).

Petitioner denied fraud, asserted non-joinder of one Walter Moring as an indispensable party defendant, in-

capacity of the original and intervening parties to maintain the suit, and pleaded estoppel, laches and ratification.

After issues thus joined, the first trial was to a jury, with the result that the district judge directed a verdict in favor of petitioner upon what proved to be a misconception of local law. Plaintiffs, respondents here, appealed. The Circuit Court of Appeals reversed and remanded (140 F. 2d 176). In response to the several issues raised on appeal, that court, *inter alia*, held: (1) That the relief sought was of an equitable nature and trial by jury was not a matter of right; (2) That the court had jurisdiction; (3) That both Mrs. White and the intervening parties had capacity to maintain the suit; (4) That Walter Moring was not an indispensable party defendant; (5) That there was ample evidence, if believed, to establish fraud; and (6) That there was no ratification as an unmixed question of law.

On remand to the District Court, respondents amended, demanding an accounting for oil produced and marketed, and a judgment for their *pro rata* part thereof, less a like percentage of the reasonable costs of drilling and operating the well located upon the unit (Tr. 2, p. 21). Thereupon, petitioner, with reference to Moring, moved the court to proceed to judgment on the merits (Tr. 2, p. 16). The case was tried by the court without a jury upon the same record as made on the first trial, with the result that final judgment was rendered for respondents, cancelling the co-lessor's agreement for fraud in its procurement and directing that an accounting be made as demanded (Tr. 2, pp. 31-33).

Findings of fact and conclusions of law were entered by the District Court (Tr. 2, pp. 24-31). That court found as facts that the co-lessor's agreement was procured by wilful fraud on the part of petitioner's agent and was invalid, that the parties, respondent here, all had capacity to maintain the suit, that Walter Moring was not an indispensable party defendant, that there was no ratification of the invalid instrument, and that respondents were not barred by waiver, estoppel, laches or other equitable doctrine.

After supplemental judgment and findings upon the accounting features of the case (Tr. 2, pp. 58-61), petitioner appealed. The Circuit Court of Appeals reversed on the original hearing, without expressly writing upon the sufficiency of the evidence on the issues of fact, but holding that, whereas, Walter Moring was not an indispensable party to the cause, petitioner was faced with the possibility of hardship which might result from double payment in the event that the Moring claim, then the subject of a separate suit in the same District Court, was thereafter sustained. The cause was remanded by this opinion, with directions to the District Court that the case be consolidated with the Moring suit so as to avoid possible hardship to petitioner (158 F. 2d 856).

Respondents filed a petition for rehearing in the Circuit Court of Appeals, (Tr. 2, pp. 85-125) which was denied, with Judge Holmes, Circuit Judge, dissenting (153 F. 2d 859). Prior to the issuance of the mandate, as directed by the first opinion, the Moring claim and suit was disposed of in the District Court adversely to the Moring

claim; and on application of respondents, (Tr. 2, pp. 131-139) accompanied by a certified copy of the proceedings in the Moring suit (Tr. 2, pp. 140-170), rehearing was granted in this cause (156 F. 2d 58); and on final submission the former opinion on the second appeal was withdrawn and the judgment of the District Court was affirmed, the court observing on factual issues that it could not be said that the findings of the District Court were clearly erroneous (157 F. 2d 254).

Additional facts, pertinent to the specific questions presented in petitioner's brief, will be stated under appropriate headings. Respondents respectfully submit that the judgment of the Circuit Court of Appeals was correct upon all issues and that no appropriate questions are presented which would warrant review by this honorable court.

For convenience in reference, the pertinent opinions and findings of the courts below, including all of those hereinabove referred to, have been included in the appendix to this brief. (See Index to Appendix.)

Respondents present the following answers to the specific questions argued in petitioner's brief:

I.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE ORIGINAL PLAINTIFF, MRS. WHITE, HAD CAPACITY TO MAINTAIN THE SUIT, OR IN NOT ORDERING THE SAME DISMISSED.

Petitioner's statement to the effect that the original bill filed by Mrs. White alleged that she had sold her entire interest to Walter Moring is inaccurate because by paragraph 6 it is alleged that Mrs. White was to receive an oil payment of $5,000.00 (Tr. 1, p. 4).

The intervening petition of those claiming under the White to Moring deed sought confirmation of title as against petitioner, "subject to the right of Mrs. Minnie E. White, the original plaintiff herein, to the oil payment and consideration recited in her declaration, for which these plaintiffs recognize their obligation". (Tr. 1, pp. 26-30.)

Thus it is shown that Mrs. White retained an interest in the property to the extent of an oil payment therefrom. The proof was in support of the pleadings with petitioner objecting on the basis of parol evidence rule (Tr. 1, pp. 240; 253-256). On this point, the Circuit Court of Appeals on the first appeal affirmed the holding of the District Court sustaining the capacity of Mrs. White to maintain the suit, and, in so doing, said:

> "The Court below did not err in admitting parol evidence to prove that Mrs. White was entitled to receive an oil payment of $5,000 in addition to the

recited consideration of $500 paid her upon the execution of the deed to the interveners. The parol evidence rule has no application to the recited consideration in a deed. (Raleigh State Bank vs. Williams, 150 Miss. 766, 117 So. 365; Rule 43(a) of Federal Rules of Civil Procedure.) Moreover, the rule is limited to the parties to the writing and their privies. A third party is not in a position to invoke the rule. (Whitney vs. Cowan, 55 Miss. 626; 3 Jones' Commentaries on Evidence, 2nd Ed., 2708, Sec. 1488.)

"Mrs. White is a proper party to maintain this action; but if she were not, the other appellants are proper parties, since the effect of a quit claim deed in Mississippi is to convey the entire title of the grantor."

In order to secure the oil payment due Mrs. White, it was essential that the invalid co-lessor's agreement be cancelled and removed as an obstacle to her recovery. Therefore, Mrs. White was a real party in interest.

II.

THE INTERVENING PLAINTIFFS CLAIMING THROUGH MRS. WHITE HAD CAPACITY TO MAINTAIN THE SUIT TO CANCEL FOR FRAUD PRACTICED UPON MRS. WHITE.

The petitioner's statement that plaintiffs were trafficking in the claim and assertion of fraud has no basis whatever in the record. The fraud was perpetrated on Mrs. White on July 31, 1939 (Tr. 1, p. 81). On October 17, 1939, Mrs. White executed the deed naming one Walter

Moring as grantee (Tr. 1, p. 9). The fraud was not discovered until July 1941, and none of the plaintiffs had any knowledge thereof prior to that time (Tr. 1, pp. 249, 253-266).

The point as to the capacity of the intervening plaintiffs to maintain the suit based on fraud was raised by motion of petitioner (Tr. 1, p. 47), which was overruled by the district court (Tr. 1, p. 71). In response to the argument of this point on the first appeal (140 F. 2d 176), the Circuit Court of Appeals said:

> "Mrs. White is a proper party to maintain this action; but if she were not, the other appellants are proper parties, since the effect of a quit claim deed in Mississippi is to convey the entire title of the grantor. The interveners are asserting a complete fee-simple title to Mrs. White's former interest in the Adcock land, subject only to her right to receive $5,000 out of oil produced from said interest. The cancellation of the co-lessor's agreement is sought by the interveners merely as an incident to the property rights acquired by them from their grantor. (Traer vs. Clews, 115 U. S. 528, 6 So. Ct. 155, 29 L. Ed. 467; 4 Am. Jur. 258, Sec. 40.) Aside from this, there are two Mississippi statutes that remove all doubt as to their right to maintain an action of this class. (Sections 404 and 405 of the Mississippi Code.)"

In *Traer vs. Clews*, 115 U. S. 528, 29 L. Ed. 467, the rule was stated as follows:

> "The rule is that an assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void as contrary to public policy and

> savoring of maintenance. But when property is conveyed, the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void. This distinction is taken in the case of Dickinson v. Burrell, Law, Rep. 1, Eq. 337."

The case of *Graham vs. LaCrosse & Milwaukee Railroad Co.*, 102 U. S. 132, 26 L. Ed. 106, cited by petitioner, does not militate against respondents' position. The court in that case recognizes the rule as later defined in *Traer vs. Clews, supra.* The quotation contained in petitioner's brief as being the language of this court is merely the language of an old Wisconsin case which was referred to because the court considered itself bound by Wisconsin law.

The two sections of the *Mississippi Code* referred to in the opinion of the Circuit Court of Appeals quoted above, these being *Mississippi Code of 1930, Sec. 404 and 505,* are included in the appendix to this brief. (Reference by the Circuit Court of Appeals to Sec. 405 is a typographical error, the correct reference being as above stated.) *Mississippi Code of 1930, Sec. 404,* provides that the real owner of property may file a bill to remove a cloud, doubt, or suspicion cast upon his title when any person not the rightful owner shall assert any claim or pretend to have any right or title thereto. This statute makes no exception. By Section 505 of the same code, the common law objection to assignments of choses in action was abolished, the provision being that, "The assignee of any choses in action may sue for and recover on the same in his own

name, if the assignment be in writing". For full text, see appendix.

From the above authorities, it appears that respondents did not assert a "mere right to sue for fraud", but, on the contrary, sought cancellation merely as an incident to property rights acquired by and vested in the intervening plaintiffs, from which it follows that there is no valid objection to the maintenance of the suit.

III.

WALTER MORING WAS NOT AN INDISPENSABLE PARTY AND THE COURT DID NOT LACK JURISDICTION.

Respondent, Mrs. White, conveyed title, naming as grantee one Walter Moring. The deed was executed on October 17, 1939 (Tr. 1, p. 9). Actually, Moring's name was used only for convenience, it appearing from the proof that the transaction was handled in his absence and without his knowledge by one Walter Trout as agent for A. L. Stevens (now Mrs. Walter Trout, respondent), for her benefit and with money furnished by Stevens (Tr. 1, pp. 99-104; 205-208; 237-239; 249-253). On January 10, 1940, Moring conveyed by deed to A. L. Stevens (Tr. 1, pp. 30-32), and the execution of this deed was duly proven (Tr. 1, pp. 180-198). On July 25, 1941, A. L. Stevens (then Mrs. Walter Trout) conveyed to Joab Turner Broocks, respondent, in trust (Tr. 1, pp. 34-36).

Subsequent to the execution and recording of the Moring to Stevens deed, the grantor, Moring, was heard to

make oral assertion that he had not signed the deed, and, as a result of this, suit was filed in the District Court by Broocks, Trustee, a resident of Louisiana, against Moring to cancel the oral claim as a suspicion upon the trust estate (Tr. 2, p 141).

Prior to the first trial of the case at bar, petitioner took Moring's deposition, which, incidentally, upon its face showed the absence of any valid claim by Moring (Tr. 1, pp. 322-339), and proceeded to use this as a basis for a plea to the jurisdiction of the District Court, averring thereby the non-joinder of an allegedly indispensable party whose presence as a party defendant, if required, would have destroyed requisite diversity of citizenship (Tr. 1, pp. 47-54).

At the time of the above mentioned plea and thereafter, Moring was a resident citizen of the State of Texas (Tr. 1, p. 322), as was one of the intervening plaintiffs (Tr. 1, p. 26). Also, Moring was in the armed service of the United States and beyond the jurisdiction and process of the court (Tr. 1, p. 322), and because of this fact proceedings in the separate suit against him by Broocks had been stayed under the Soldiers' and Sailors' Civil Relief Act (Tr. 2, pp. 156-161).

The District Court overruled the motion to dismiss, upon the view that equitable relief could be awarded as among the parties before the court without affecting the claimed interest of Walter Moring (Tr. 1, p. 71). On the first appeal, the Circuit Court of Appeals affirmed this action, stating in the opinion: "We agree with the

ruling below that Walter Moring was not an indispensable party." (140 F. 2d 176.)

On remand from the first appeal, respondents amended so as to demand relief by way of an accounting for oil produced and marketed (Tr. 2, p. 21). As to Moring, the District Court found as a fact the following (Tr. 2, p. 28):

> "Walter Moring is not a necessary part to this suit and the decree to be entered cannot affect his rights, if any. As against the defendant, Union Producing Company, the beneficial interest and title of plaintiff and intervening plaintiffs has been established. The Court finds that the beneficial interest and the legal and equitable title to all of the oil, gas and other minerals in, on or under the Minnie E. White interest in the Adcock tract is now owned and vested in Joab Turner Broocks, Trustee for Mrs. Frank Broocks and Mrs. Walter Trout, subject to an oil payment of $5,000.00 to Mrs. Minnie E. White. Walter Moring never acquired any beneficial or equitable title or interest in this property and, on January 10, 1940, he signed and delivered a deed to A. L. Stevens, conveying to her his record title to the minerals, which is the same title now vested in Joab Turner Broocks, Trustee, as aforesaid."

On the second appeal, petitioner contended that the accounting features of the case, which had been injected by amendment prior to the second trial, rendered Moring indispensable as a party defendant. Rejecting this contention, the Circuit Court of Appeals said (153 F. 2d 856):

> "An amount due by appellant for the oil (the res) has not been deposited in the registry of the court,

> and the adverse claimants have not been cited to establish their interest therein. If such were the case, Moring would be an indispensable party. A suit for an accounting is not an action over the res but a personal action; in such action Moring is not an indispensable party. (Cf. 'Indispensable Parties,' 9 Encyclopedia of United States Supreme Court Reports, III, A, 2, b, page 41.)"

In addition to the authority cited to the text immediately above quoted, the Circuit Court of Appeals, observing that the subjection of appellant to a possible double liability did not make Walter Moring an indispensable party, cited and quoted at length from *Williams vs. Bankhead*, 86 U. S. 563, 22 L. Ed. 184, which authority fully supports the conclusion.

However, the Circuit Court of Appeals pointed out that, "To avoid possible hardship, the court below should have stayed the proceedings in this suit until the action brought by Broocks against Moring had been finally adjudicated, or should have consolidated the two suits for trial." Despite the fact that no such relief had been requested by the defendant, the Circuit Court of Appeals in this opinion reversed and remanded in order that the suit by Broocks against Moring, pending in the court below, might be consolidated with this suit (153 F. 2d 856), but before the mandate was issued, there was a final adjudication of the Broocks vs. Moring suit adversely to the claims of Moring and, on application therefor (Tr. 2, p. 131), the Circuit Court of Appeals granted rehearing (156 F. 2d 58) and, on final submission, the case was affirmed pursuant to the opinion entered on September 17, 1946 (157 F. 2d 254).

In reply to petitioner's argument, respondents contend that Moring was not an indispensable party defendant at any stage of the proceedings, but if mistaken in the view that he was indispensable to the relief originally sought by way of cancellation, the objection was effectually removed: (1) by amendment prior to trial whereby accounting was demanded, or, if mistaken, then (2) by complete adjudication upon and elimination of the Moring claim prior to final decision by the Circuit Court of Appeals.

One of the chief fallacies of petitioner's argument is the erroneous assumption that the question of the non-joinder of parties is jurisdictional, when, on the contrary, it is established that the objection is one in abatement and that the rule pertaining to parties is one of propriety and not of jurisdictional power or authority. *Shields vs. Barrow,* 17 How. 130, 15 L. Ed. 158; *Bourdieu vs. Pacific Western Oil Company,* 299 U. S. 65, 81 L. Ed. 42; *State of Washington vs. United States* (C. C. A. 9th, 1936) 87 F. 2d 421; *American Falls Reservoir District No. 2 vs. Crandall* (C. C. A. 9th, 1936) 85 F. 2d 864; *Utilities Production Corporation vs. Carter* (C. C. A. 10th, 1934) 72 F. 2d 655.

Since the rule that federal courts will not proceed to final judgment without requisite parties is one of propriety and not of jurisdictional power, it follows simply that the court will not or cannot properly proceed to judgment *unless* or *until* the situation is cured by amendment to bring in the absent party or to recast the relief sought by the complaint so as to obviate the objection. Where such is not or cannot be done, the bill is dismissed under the rule for the equally simple reason that, "Nothing

is to be gained by retaining it, when it is certain that the complainant can never be entitled to a decree in his favor." *American Falls Reservoir District No. 2 vs. Carter, supra,* and cases therein cited.

In the case at bar, the Circuit Court of Appeals held, and all parties agree, that the Moring claim was completely eliminated and finally adjudicated adversely to Moring and that such adjudication was had prior to final judgment by the Circuit Court of Appeals (Tr. 2, pp. 193-195). Admittedly the court at all times had jurisdiction of the subject matter and diversity at all times existed as between the plaintiffs and the defendant before the court. Therefore, the court was never without jurisdiction to proceed, and, upon the elimination of any possible claim or interest of Moring by final adjudication in the suit against him, any possible objection to the entry of final judgment in this cause was removed, and this is so even if we should concede for the sake of argument that Moring originally was absolutely indispensable, which, however, is denied.

But, aside from the foregoing considerations, respondents submit that at no time was Moring absolutely indispensable under the federal rule.

Parties are classified in the leading case of *Shields vs. Barrow*, 17 How. 130, 15 L. Ed. 158, into three categories, namely: Formal, necessary a[illegible]ndispensable. The distinction between these categories is further explained in *Barney vs. Baltimore*, 73 U. S. 280, 18 L. Ed. 825, and in *Williams vs. Bankhead*, 86 U. S. 563, 22 L. Ed. 184.

Pursuant to the enactment of the statute reported in *28 U. S. C. A. Sec. 111* and *Rule 19 of the Federal Rules of Civil Procedure*, it is universally held that formal parties may, but need not, be joined; that necessary parties must be joined *on condition* that process is obtainable and venue or jurisdiction would not thereby be affected. Indispensable parties are those without whom the court will not or cannot proceed to adjudicate the questions presented by the litigants and do justice. See *2 Moore's Federal Practice at page 2160.*

Respondents rely, as they did below, on the case of *Waterman vs. Canal-Louisiana Bank & Trust Company*, 215 U. S. 33, 54 L. Ed. 80, which is analogous on the facts. Reference is also made to *Elmendorf vs. Taylor*, 10 Wheat. 152, 6 L. Ed. 289, cited with approval in *Bourdieu vs. Pacific Western Oil Company*, 299 U. S. 65, 81 L. Ed. 42, in which last cited case, decided in 1936, this honorable court used the following language:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. West v. Randall, (C. C.) 2 Mason, 181, 196, Fed. Cas. No. 17,424 (opinion by Mr. Justice Story); Cole Silver Min. Co. v. Virginia & G. H. Water Co., (C. C.) 1 Sawy. 685, 689, Fed. Cas. No. 2,990 (opinion by Mr. Justice Field); Story, Eq. Pl. 8th ed. Sections 77, 96. And see Russell v. Clark, 7 Cranch, 69, 98, 3 L. ed. 271, 281; Elmendorf vs. Taylor, 10 Wheat. 152, 167, 168, 6 L. ed. 289, 294. Cf. Equity Rule 39.

> "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."

The action in the case at bar was one to cancel the colessor's agreement under which petitioner claimed as a cloud upon respondents' title, pursuant to *Mississippi Code of 1930, Sec. 404* (See Appendix). As pointed out in *Section 115 of Griffith's Mississippi Chancery Practice*, the plaintiff under this statute may proceed against any one of several who hold or assert claims to the land and is not obliged to make as parties all who hold a claim, but may proceed against those of his own choosing.

Under the above mentioned statute, it is the duty of the plaintiff to prove his title and rely upon the strength of his own title rather than the weakness of his adversary's. Respondents, recognizing this duty, proceeded to prove their title to the interest in question, both legal and equitable, and, based upon this proof, the District Court found as a fact that, as between plaintiffs and the Union Producing Company, plaintiffs had established their title and were entitled to relief. Petitioner elected to question plaintiffs' title, and, in an effort to establish this defense, took the deposition of Walter Moring and introduced this in evidence, the effect of which simply was to put in issue the plaintiffs' title and require the proof, which was in fact offered and acted upon by the courts below. That Walter Moring in these circumstances was not an indispensable party is held in *State of Washington vs. United*

States, (C. C. A. 9th 1936) 87 F. 2d 421, wherein the court held that it could render justice between the litigating parties in the absence of one claiming title as against the plaintiffs. In this connection, the court said:

> "If appellants defend on the ground that someone else owns the property, such a defense may be presented by them. It would not be necessary for the alleged owner to present such a defense, for complaint would have to prevail on the strength of its title, and not on the weakness of appellant's title."

Another case directly in point is *Utilities Production Corporation vs. Carter Oil Company,* (C. C. A. 10th, 1934) 72 F. 2d 655, wherein the court, in dealing with an identical question, said:

> "All those claiming an interest in real estate are proper parties to a suit to quiet title thereto; they are not indispensable parties, for a title may be quieted against one claimant without affecting the rights of another who is not made a party. The rights of two claimants to property may be determined inter sese, without joining all claimants. Williams v. United States, 138 U. S. 514, 11 S. Ct. 457, 34 L. Ed. 1026, Daniels v. Wagner, 237 U. S. 547, 35 S. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 116, Ann. Cas. 1917A, 40; Texas Co. v. Central Fuel Oil Co., (C. C. A. 8) 194 F. 1."

Moreover, it appears from a consideration of the testimony, including the admissions of Moring in his deposition, that his claim was frivolous and that it was without substantial basis. If the law of Mississippi has any effect, it is held in *McClendon vs. McGee,* 189 Miss. 712, 198 So. 725,

that a party is not a necessary party unless it be shown on the record that "there is some substantial basis" for his claim.

Even if it could be said that Moring was indispensable to relief by way of cancellation, respondents do not understand petition now to contend that this party was indispensable to relief by way of accounting which was the relief prayed for prior to the second trial and by amendment to the original and intervening complaint. As pointed out by the Circuit Court of Appeals in its first opinion on the second appeal, the possibility of double liability as against petitioner did not make Moring an indispensable party. We have demonstrated, we submit, that a possible objection for non-joinder may be obviated by amendment. At most, petitioner was entitled to a stay of proceedings, pending disposition of the Moring claim, and this relief, although not requested, was granted by the Circuit Court of Appeals, of its own motion, subsequent to which the Moring claim was disposed of in the manner above mentioned.

In passing, it is to be observed that petitioner's statement in argument, to the effect that the Circuit Court of Appeals in its second opinion measured jurisdiction by the effect of an amendment asking for relief by way of accounting, is inaccurate. That court simply held that the accounting features of the case did not make Moring indispensable when he was not indispensable as a party at the outset.

Petitioner does not venture to advance any reason why final judgment could not be rendered between the parties before the court in the absence of Moring. The trial judge considered that such could equitably be done, and the Circuit Court of Appeals agreed.

Petitioner received at the hands of the Circuit Court of Appeals by the first opinion on the second appeal all that equity could require, and, we think, more, that is to say, a stay of proceedings pending disposition of the Moring claim, which was then the subject of separate suit in the same district court. Since, subsequent to that opinion and prior to the final opinion on rehearing, the Moring claim was disposed of adversely to the claim of Moring, thus fully vindicating respondents' position and effectually removing the possibility of double recovery, respondents submit that petitioner has received at the hands of equity all that justice could require and more.

Petitioner has no claims upon the benevolence of equity as a result of the Moring issue, and now, in fact, asserts none. Its position, on the contrary, is technical, unfounded in fact or law, and contrary to sound public policy which here would certainly favor an end to more than five years of expensive litigation, involving, as it does, two trials, two appeals, and one rehearing on appeal, and representing, as it does, the exhaustive efforts of courts and counsel, as evidenced by the consideration of hundreds of pages of records and briefs.

IV.

EVIDENCE OF FRAUD IS SUFFICIENT UNDER THE LAW AS ESTABLISHED BY THE SUPREME COURT OF MISSISSIPPI.

Petitioner now argues, as it did below, that the evidence is not sufficiently clear and convincing to establish fraud. Actually, the evidence on the factual issue of fraud is sharply conflicting. Mrs. White testified positively that fraud was practiced and gave in evidence the details thereof. She was fully corroborated by the witness, Mrs. Malone. Opposed was the testimony of petitioner's agent, R. F. Gibson. The question in the final analysis was one of credibility. There were no irreconcilable conflicts in the testimony offered by respondents, and the version thus established was not contrary to reasonable probabilities. The transcript of the testimony covers 293 pages in the record and approximately 200 pages of briefs have been written, analyzing the testimony for the benefit of the appellate court. No useful purpose would be here served by a detailed analysis such as was presented below.

On the first appeal, it was held that there was ample evidence, if believed, to establish fraud. On the second trial, the District Court, after full hearing, believed the evidence and found actual, active fraud in fact. On the second appeal, the court affirmed the findings, observing that, "Giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses, we cannot say that its findings that fraud was practiced is clearly erroneous."

The courts below recognized and expressly reaffirmed ıe local rule requiring that evidence of fraud be clear nd convincing, finding in view thereof that respondents ad fully met the burden thus imposed; hence there was o misapplication of local law.

This court has consistently held that certiorari will not ssue merely to review the evidence or the inferences lrawn from it. Thus, in *General Talking Pictures Cor-)oration vs. Western Electric Company,* 304 U. S. 175, 82 L. Ed. 1273, the court said:

> "Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 68 L. ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U. S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. United States v. Chemical Foundation, 272 U. S. 1, 14, 71 L. ed. 131, 142, 47 S. Ct. 1; United States v. McGowan, 290 U. S. 592, 78 L. ed. 522, 54 S. Ct. 95; Alabama Power Co. v. Ickes, 302 U. S. 464, ante 374, 58 S. Ct. 300. There is evidence to support them."

Recent cases supporting the "concurrence" rule as announced in the above quoted opinion are: *United States vs. O'Donnell,* 303 U. S. 501, 82 L. Ed. 980; *United States vs. Johnson,* 319 U. S. 503, 87 L. Ed. 1546; *Anderson vs. Abbott,* 321 U. S. 349, 88 L. Ed. 793, 151 A. L. R. 1146; *Goodyear Tire & Rubber Company vs. Ray-O-Vac Com-*

pany, 321 U. S. 275, 88 L. Ed. 721; *Kann vs. United States,* 323 U. S. 88, 89 L. Ed. 88. The rule is also well established that when findings of fact are supported by any substantial evidence, these will be accepted on appeal. *Great A. & P. Tea Company vs. Grosjean,* 301 U. S. 412, 81 L. Ed. 1193, 112 A. L. R. 293; *Borden's Farm Products Company vs. Ten Eyck,* 297 U. S. 251, 80 L. Ed. 669. Where, as here, the findings of fact depend upon whether witnesses spoke the truth, the accepted rule is that they must be treated as unassailable. *Wittmayer vs. United States,* (C. C. A. 9th, 1941) 118 F. 2d 208; *Truckers Exchange Bank vs. Conroy,* 190 Miss. 242, 199 So. 301.

Decision on the plea of ratification likewise depended upon facts. On the first appeal, the court held that there was no ratification as an unmixed question of law. On the second trial, the District Court found that there was no ratification as a matter of fact. On the second appeal this finding was affirmed.

As to such matters as waiver, estoppel, laches and ratification, petitioner had the burden of pleading and proof. *Rule 8(c) Federal Rules of Civil Procedure; Gulf Fertilizer Company vs. McMurphy,* 114 Miss. 250, 75 So. 113; *Canal-Commercial Trust & Savings Bank vs. Brewer,* 143 Miss. 146, 108 So. 424, 47 A. L. R. 45, (Motion to correct judgment dismissed in 143 Miss. 184, 109 So. 8, 47 A. L. R. 56; and writ of error dismissed in 373 U. S. 638, 639; 71 L. Ed. 818.

Such questions are "largely addressed to the sound discretion of the Chancellor, and his decision will not be

disturbed on appeal unless it is clearly wrong and amounts to an abuse of discretion". *Sample vs. Romine,* 193 Miss. 706, 8 So. 2d 257; *Comans vs. Tapley,* 101 Miss. 203, 57 So. 567, Ann. Cas. 1914 B, 307.

In view of fraud in fact, the Circuit Court of Appeals on the first appeal correctly observed that, "A court of equity should be satisfied with no evidence of waiver or ratification that does not amount to proof of assent or acquiescence. In these circumstances, the doctrine of laches has but an imperfect application", citing *McIntire vs. Pryor,* 173 U. S. 38, 43 L. Ed. 606; and *Saxlehner vs. Eisner & Mendelson Company,* 179 U. S. 19, 45 L. Ed. 60. It was also held that "Negligence is not a defense to an action based on fraud", citing *Henry vs. W. T. Rawleigh Co.,* 152 Miss. 320, 120 So. 188; *Nash-Mississippi Valley Motor Co. vs. Childress,* 156 Miss. 157, 125 So. 708; *Randolph Lumber Co. vs. Shaw,* 174 Miss. 297, 164 So. 587; *Fornea vs. Goodyear Yellow Pine Co.,* 181 Miss. 50, 178 So. 914.

The cited cases support the rule announced and represent the controlling local law on the subject. For example, in the case of *Nash-Mississippi Valley Motor Company vs. Childress,* 156 Miss. 157, 125 So. 708, the court said:

> "A purchaser has a right to rely upon the representations of a seller as to facts within the latter's knowledge, and the seller cannot escape responsibility by showing that the purchaser upon inquiry, might have ascertained that such representations were not true. Contributory negligence is not a defense to an

> action based on fraud. If a false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are in reach. Ferguson v. Koch, supra; Gannon v. Hausaman, 42 Okl. 41, 140 P. 407, 52 L. R. A. (N. S.) 519; King v. Livingston Mfg. Co., 180 Ala. 118, 60 So. 143; Fosburg v. Couture, 126 Wash. 181, 217 P. 1001, 1002."

The above quoted case was reaffirmed in 1935 in the case of *Mississippi Power Company vs. Bennett,* 173 Miss. 109, 161 So. 301. The principle of these cases has never been departed from by the Mississippi court in any respect. The cases cited by petitioner to the contrary were presented, analyzed, and distinguished in the voluminous briefs filed with the court below. Those cases are factually without application in the case at bar, and in each the long established principle as announced in *Nash-Mississippi Valley Motor Company vs. Childress, supra,* and other cases of similar import, was reaffirmed.

In the final analysis, each case must depend upon its own peculiar circumstances, and we find in the case at bar that all issues were purely factual. The factual findings determine that actual, active fraud in the procurement of the questioned document was perpetrated upon Mrs. White and that Mrs. White was induced to sign the document by intentional fraudulent representations on the belief, thus induced, that she was signing something entirely different which would not affect her property rights. It was also established that Mrs. White, having a legal right so to do, relied upon the false statements in

signing the document. Petitioner failed to establish that respondents assented to or in any wise acquiesced in the co-lessor's agreement after perpetration of the fraud.

On the first hearing of the second appeal, the Circuit Court of Appeals, in remanding the case, left the District Court free to again pass upon the fact of fraud. The court expressed some apprehension that the trial court may possibly have misconstrued the opinion or mandate on the first appeal. This apprehension later disappeared, and petitioner now asserts that this was "not only extraordinary, but arbitrary". Actually, however, the apprehension was first induced by the brief of petitioner below, wherein the court was grossly misled as to the true contents of the record. The record facts were pointed out by respondent upon petition for a rehearing (Tr. 2, pp. 85-125), and, in the light thereof, Judge Holmes observed in his opinion that, "The apprehended mistake as to the mandate has disappeared like mist before the sun", (153 F. 2d 859). The same misleading statements are made in the petitioner's brief in this court.

V.

NO RATIFICATION RESULTED FROM THE CASHING OF THE FIVE DOLLAR CHECK.

The issue of ratification has been largely covered under the proposition next preceding this, and we consider it appropriate at this point to add only that, based upon the evidence, the trial court found as a fact that Mrs. White, in cashing the draft, relied upon the fraudulent repre-

sentations of petitioner's agent and was deceived into believing that the draft was, as falsely represented, for her trouble in signing a paper to establish her heirship in the Adcock property. It was also found as a fact from the evidence that Mrs. White did not in fact read what was written on the draft and that her neglect in this regard was not such as to amount in law or in fact to assent or acquiescence in the co-lessor's agreement or in the writing on the draft. (Tr. 2, pp. 24-31.)

There was ample evidence to support the findings of the trial court, and, after a careful review of the evidence, the Circuit Court of Appeals concurred, from which it follows, we submit, that review on certiorari is unwarranted.

Although it is immaterial to any real issue, respondents dispute the statement of petitioner that a bonus of $1.00 per acre was the going price in Mississippi for oil leases, especially where, as here, a test well nearby and within the block held by petitioner was in the process of drilling and substantially completed. Petitioner's assertion is not based upon any evidence. The alleged consideration paid Mrs. White, under the circumstances, would have been nominal and grossly inadequate. However, relief was based upon fraud and not upon failure of consideration as such.

Additional comments and authorities bearing upon such issues as waiver, ratification, estoppel and laches are included in the following pages of this brief.

VI and VII.

PLAINTIFFS WERE NOT ESTOPPED TO ASSERT INVALIDITY AND WERE NOT GUILTY OF LACHES, BARRING RIGHT TO RECOVERY.

Since the above two propositions involve similar principles, they will be treated together.

Authorities bearing upon the alleged defense of ratification are equally applicable to questions of estoppel and laches, and reference is made to propositions IV and V above.

Petitioner, asserting estoppel and laches, contends for review of the findings of fact by the trial court and the concurrence therein by the Circuit Court of Appeals whereby it was determined that such asserted defenses did not exist in fact. The review sought by petitioner only involves the evidence and the inferences drawn therefrom. As previously observed, such matters of estoppel and laches rest largely within the discretion of the District Judge.

Factually, petitioner is in the curious position of attempting to invoke the conscience of equity to relieve itself from the direct consequences of its own wrong. Thus, it appears that petitioner does not come before the court with clean hands and it did not act in good faith. This follows from the fact that petitioner, through its agent, perpetrated a fraud in the procurement of the questioned document, and therefore had full knowledge of the facts and of the invalidity of the co-lessor's agreement.

On the other hand, it is established without contradiction in the evidence that respondents were ignorant of the fraud and of the very existence of the co-lessor's agreement until long after the occurrence of every event upon which petitioner assumes to rely. As stated by the Circuit Court of Appeals on the first appeal, petitioner was not an innocent purchaser.

Under proposition V, petitioner argues that a clause in the printed form of the Moring to Stevens deed worked an estoppel, this clause being that, "This conveyance is made subject to any *valid* and *subsisting* oil, gas or other mineral lease or leases on said land". The most obvious specific answer to this question is that, whereas there were valid leases upon 94% of the 80-acre tract, as to which respondents claim no interest, the alleged lease from Mrs. White was void for fraud in its procurement, and hence was not "valid and subsisting". Moreover, at the time this deed was made, respondents had no knowledge of the fraud or of the existence in fact of the alleged co-lessor's agreement. In view of this, no intention to ratify could have existed. No estoppel could result for a number of reasons, one of which is that there is no showing that petitioner in any way acted in reliance upon the recitations of the deed.

Under proposition VI, petitioner argues that the doctrine of laches should apply because it drilled two wells on the tract at large cost and without protest from respondents.

The most obvious specific answer to this argument lies with a correct appreciation of the relation of the parties to the property. Petitioner held unquestioned leases upon

94% of the eighty-acre tract. Respondents owned only 4.8 undivided acres in the tract as tenants in common, or a total interest of 6%. In these circumstances, petitioner had the indisputable right to drill and to take 94% of production, and respondents had no right to interfere. It is so established in *Miles vs. Fink*, 119 Miss. 147, 80 So. 532, wherein the rights of tenants in common are stated.

There is no showing that petitioner would have ceased drilling upon any protest from respondents, as owners of a small undivided interest in the property, nor is any such claim or contention made by petitioner. In fact, the record demonstrates quite the contrary. Also, it was not shown that respondents had knowledge that drilling was in progress upon the particular acreage.

Petitioner fails to establish any one of the several conditions precedent to the application of the equitable doctrines relied upon. Substantially, the same principles apply to questions of waiver, ratification, estoppel and laches. One of the foremost of these principles is that estoppel cannot be invoked against any party on account of acts or omissions to act while in ignorance of the facts. On the other hand, and equally controlling here, is the requirement that the party invoking the doctrine be not only destitute of knowledge of the facts but also of the means of acquiring such knowledge. *31 C. J. S. Estoppel, Section 109; Brant vs. Virginia Coal and Iron Company*, 93 U. S. 326, 23 L. Ed. 927; *Crary vs. Dye*, 208 U. S. 515, 52 L. Ed. 595.

Also, an estoppel operates only in favor of one who, in reliance upon the act, representation, or silence of another, so changes his situation that injury would result if the truth were known. *Staton vs. Bryant*, 55 Miss. 261; *Davis vs. Butler*, 128 Miss. 847, 91 So. 279, 709; *Day vs. McCandless*, 167 Miss. 832, 142 So. 486; and *Plant Flour Mills Co. vs. Sanders & Ellis*, 172 Miss. 539, 157 So. 713. Moreover, a party litigant may not take an advantage which has the party's own wrong as a foundation therefor. *Crabb vs. Comer*, 190 Miss. 289, 200 So. 133. A party cannot rely on estoppel when he is responsible for the facts that constitute estoppel, since two estoppels destroy each other. *Hopkins vs. Hopkins*, 174 Miss. 643, 165 So. 414. The doctrine of estoppel in Mississippi is founded on the principle that he who seeks equity must do equity and no litigant may rely upon the doctrine who does not enter the court with clean hands. *Barron vs. Federal Land Bank of New Orleans*, 182 Miss. 50, 180 So. 74; and *Barrier vs. Kelly*, 82 Miss. 233, 33 So. 974, 62 L. R. A. 421.

In Mississippi, stale claims are unknown as a defense, and, in the absence of estoppel, no mere lapse of time, short of the statutes of limitation, will bar relief. *Houston vs. National Mutual Building and Loan Association*, 80 Miss. 31, 31 So. 540. The same rules apply in the application of laches as apply in case of estoppel. *Comans vs. Tapley*, 101 Miss. 224, 57 So. 567. In the exercise of a sound discretion, the trial court found that there existed no waiver, ratification, estoppel, laches, or other equitable matter to bar relief. The facts fully support the finding. The Circuit Court of Appeals twice concurred. There is, we submit, no basis for review on certiorari.

CONCLUSION.

Only factual issues are presented by the record. The findings in respondents' favor depended upon the credibility of witnesses. All factual findings have received the concurrence of the Circuit Court of Appeals. No questions of general importance arise and there has been no departure from local law. We respectfully submit that certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, the undersigned attorney for respondents, certify that I have this day mailed, postage prepaid, three correct copies of the above and foregoing brief for respondents to William A. Vinson, Esquire, Attorney of Record for Petitioner, Niels Esperson Building, Houston, Texas.

So certified, this, the .... day of ....., 1946.

FREDERICK J. LOTTERHOS,
Attorney for Respondents.

APPENDIX.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 10690.

Minnie E. White, et al., Appellants,
versus
Union Producing Company, Appellee.

Appeal from the District Court of the United States for the Southern District of Mississippi.

(January 19, 1944.)

(140 F. (2) 176.)

Before SIBLEY, HOLMES, AND WALLER,
Circuit Judges.

HOLMES, Circuit Judge: This is a controversy over an undivided interest in 80 acres of oil land in Yazoo County, Mississippi. The common source of title of all parties hereto is the appellant, Mrs. Minnie E. White, who filed this suit praying confirmation of her title and

cancellation of a co-lessor's agreement executed by her. The other appellants were allowed to intervene in the court below as parties plaintiff, having acquired the plaintiff's interest in said land except as to alleged oil payments amounting to $5,000.

This is a civil action under the Federal Rules of Civil Procedure, which abolished all distinctions as to forms between actions at law and suits in equity. It presents a controversy wholly between citizens of different states; the requisite jurisdictional amount is involved; and all indispensable parties are in court.[1] The principal issue before us depends upon the validity of a co-lessor's agreement, which is claimed to be void and the execution of which is alleged to have been procured by fraud. A jury was demanded by the plaintiffs, and granted by the court below without objection. After all of the evidence had been introduced and both sides had rested, the district court gave a peremptory instruction to the jury to find for the defendants. Judgment upon the verdict was entered for the defendants, and the plaintiffs appealed.

The relief sought was of an equitable nature, and neither of the parties was entitled to a trial by jury as a matter of right. The verdict rendered was merely advisory,[2] but that is immaterial, since the court directed it, let it stand, and entered a judgment upon it. The court did not set the verdict aside, as it might have done, and make its own findings of fact as required by rule 52(a) of the Federal Rules of Civil Procedure. The court gave the reasons for its ruling, which included a statement of its conclusions of law.

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1 We agree with the ruling below that Walter Moring was not an indispensable party.

2 See rule 39(c) of Federal Rules of Civil Procedure.

The court said that, assuming the fraud to have been perpetrated and that the lessor did not read the lease, or the draft for five dollars given her for executing it, yet she was guilty of such gross negligence in failing to read the draft that she was precluded from claiming that the agreement should be set aside for fraud. For this reason it held that she could not recover. We think the court erred in so holding, because under the Mississippi law, which governs our decision, contributory negligence is not a defense to an action based on fraud.[3] The appellant, Mrs. White, had the right to rely upon the representations made to her by the appelle's agent as to the nature of the paper she was asked to sign, and to accept his statements as true without inquiry, although the means of correct information were within reach.[4]

Appellants concede the rule in Mississippi to be that fraud must be proven by clear and convicing evidence. They accepted that burden on the trial below, and introduced ample evidence, if believed, to support a finding of actual fraud. The testimony on this issue was direct and positive, and presented an issue of fact. The character of the misrepresentation, and the improbability of an ordinarily prudent person being deceived by it, may be taken into consideration in passing upon the facts; but they do not present an unmixed question of law when the evidence is conflicting or different inferences fairly may be drawn therefrom. Fraud vitiates everything it touches;[5] it is difficult to define;[6] there is no

[3] Henry v. Raleigh Co., 152 Miss. 320, 120 So. 188; Nash-Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708; Randolph Lumber Co. v. Shaw, 174 Miss. 297, 164 So. 587; Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 178 So. 914.

[4] In Brown v. Norman, 65 Miss. 369, 4 So. 293, 7 A. S. R. 663, the court said: "The complainant owed the defendant no duty to investigate the condition of the firm; he had the right to rely upon the truth of the representations made by the defendant, and all that was required was that he should act when he discovered the fraud of which he was the victim."

[5] Fay & Egan Co. v. Cohn & Bros., 158 Miss. 733, 740, 130 So. 290, 292.

[6] Smith v. State, 107 Miss. 486, 496, 65 So. 564, 567.

absolute rule as to what facts constitute fraud; and the law does not provide one "least knavish ingenuity may avoid it". There is a distinction between the case of an individual who imprudently executes a contract without reading it, and of one who signs a contract in reliance upon fraudulent misrepresentations as to its contents.

This is not a case where one of two innocent parties must suffer from the wrongful act of a third person. There are no innocent purchasers for value claiming under this instrument. The party whose agent committed the fraud is still in possession of the property. It is present in court pleading laches and other defenses. He who acts through an agent acts himself; so runs the legal maxim; and a corporation cannot act except through an agent. In directing a verdict for the defendant, the district court expressly assumed that the alleged fraud had been committed; that the defendant's agent had told Mrs. White that the paper she signed was only a certificate of her heirship to the Adcock property; and yet it held that her failure to read the draft for five dollars, which she had every opportunity to read, precluded her recovery.

Assuming the fraud to have been committed, as was done by the court below, the appellee cannot retain the fruits thereof in a court of equity on a plea of negligence, since she was fraudulently induced to believe that she was signing a certificate when she was in reality executing a lease. It may be conceded that she was negligent in failing to read the lease before signing it, and the draft before endorsing it; but if the facts were as testified to by her, and as assumed by the court, the co-lessor's agreement was at least voidable,[7] and a court of equity should be satisfied with no evidence of waiver

[7] For the distinction between void and voidable transactions of this class, see Restatement of the Law of Contracts, Section 475.

or ratification that does not amount to proof of assent or acquiescence. In these circumstances the doctrine of laches has but an imperfect application.[8]

The court below did not err in admitting parol evidence to prove that Mrs. White was entitled to receive an oil payment of $5,000 in addition to the recited consideration of $500 paid her upon the execution of the deed to the intervenors. The parol-evidence rule has no application to the recited consideration in a deed.[9] Moreover, the rule is limited to the parties to the writing and their privies. A third party is not in a position to invoke the rule.[10]

Mrs. White is a proper party to maintain this action; but if she were not, the other appellants are proper parties, since the effect of a quitclaim deed in Mississippi is to convey the entire title of the grantor. The intervenors are asserting a complete fee-simple title to Mrs. White's former interest in the Adcock land, subject only to her right to receive $5,000 out of oil produced from said interest. The cancellation of the co-lessor's agreement is sought by the intervenors merely as an incident to the property rights acquired by them from their grantor.[11] Aside from this, there are two Mississippi statutes that remove all doubt as to their right to maintain an action of this class.[12]

The only remaining question is the recordation of the co-lessor's agreement and its legal effect. Was it con-

8 McIntyre v. Pryor, 173 U. S. 38; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 39.
9 Raleigh State Bank v. Williams, 150 Miss. 766, 117 So. 365; Rule 43(a) of Federal Rules of Civil Procedure.
10 Whitney v. Cowan, 55 Miss. 626; 3 Jones, Commentaries on Evidence, 2nd Ed., 2708, Sec. 1488.
11 Traer v. Clews, 115 U. S. 528, 29 L. Ed. 467; 4 Am. Jur. 258, Sec. 40.
12 Sections 404 and 405 of the Mississippi Code of 1930.

structive notice to the intervenors, if the agreement was valid? This presents a question of state law that is *not* free from doubt, and there is no authoritative decision on the subject, but we concur in the ruling below on this point for the following reasons:

R. F. Gibson was the appellee's agent in procuring the co-lessor's agreement. He was one of the subscribing witnesses thereto, though there is a conflict as to whether he signed in the presence of and contemporaneously with the other witness. He of course was present during the entire transaction. He was also the affiant that made proof of its execution as provided by section 2137 of the Mississippi Code of 1930. He had no pecuinary interest in the matter, and the mere fact that he was employed by the appellee on a fixed salary did not disqualify him to act as a non-official subscribing witness or to make such proof. Attestation by a single witness is sufficient, and a substantial compliance with the statutory form is all that is required. The proof was made in the manner required by law before an officer competent to take the same, and was duly certified to by him. Such certificate by a qualified officer, showing full compliance with the statute, is conclusive of the facts, except in cases of fraud; and if there was no fraud in procuring the execution of the instrument, there was none in making proof of its execution and having it filed for record.[13]

[13] Wilkins v. Wells, 9 S. & M. 325; Morris v. Rucks, 62 Miss. 76; Morse v. Clayton, 13 S. & M. 373. Compare the following Georgia decisions as to attesting witnesses and their disqualification: In Stimson v. Holmes, 6 Ga. App. 569, 65 S. E. 358, it was held that the agent in the transaction, having no personal interest, was competent. In Jones v. Howard, 99 Ga. 451, 27 S. E. 765, the attorney at law and agent of the grantee, though having a fee in the matter, was held a competent official witness. This was followed in Austin v. Sou. Home Association, 122 Ga. 440; Madden v. Lampley, 137 Ga. 555; Harvard v. Davis, 145 Ga. 580, 89 S. E. 740. A non-official witness, who simply swears to the execution, is no more incompetent than any other interested witness in a case. His being an officer or stockholder of the grantee corporation does not disqualify him to attest. Hastey v. Roberts, 149 Ga. 479; Peagler v. Davis, 143 Ga. 11, citing Alabama cases.

The judgment appealed from is reversed, and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

Findings of Fact.

Filed March 6, 1945.

(Title Omitted.)

The Court finds the facts to be:

This cause was ordered tried as an equity case and submitted to the Court without a jury, and the cause was so submitted in compliance with this order. By agreement of the parties, there being no further testimony to be offered, the cause was heard and tried by the Court upon the record made on the first trial.

2. The original plaintiff in this case is Mrs. Minnie E. White. The intervening plaintiffs are Joab Turner Broocks, Trustee for Mrs. Frank Broocks and Mrs. Walter Trout, and also Mrs. Frank Broocks and Mrs. Walter Trout individually. The defendant is the Union Producing Company.

3. Mrs. Minnie E. White, plaintiff, owned an undivided 4.8 acres in a tract of land in Yazoo County, Mississippi, described as follows: The W½ of the NW¼ of Section 19, Township 10 North, Range 2 West, said tract of land containing eighty acres and being known as the Adcock or Harris tract.

4. On or about July 31, 1939, the Union Producing Company, defendant, through its agent, R. F Gibson, caused Mrs. White to sign the instrument of writing sought by plaintiff and intervening plaintiffs to be canceled in this suit, under the circumstances hereinafter stated. The instrument was, in fact, a so-called co-lessor's agreement, by the terms of which an oil and gas lease in favor of defendant was made to cover the undivided interest of Mrs. White in the Adcock tract.

5. The defendant's agent, R. F. Gibson, after obtaining Mrs. White's signature on the co-lessor's agreement under the circumstances hereinafter stated, gave her a draft drawn on the defendant. This draft was payable to the order of Minnie E. White in the amount of $5.00 and it had written on the lower part words to the effect that it was the consideration for an oil and gas lease to the Union Producing Company on the Adcock tract.

6. The agent, R. F. Gibson, was at all times acting for and on behalf of the defendant, Union Producing Company, within the scope of his authority, and his acts and representations were those of his principal.

7. Subsequent to July 31, 1939, the defendant drilled and completed two wells on the Adcock tract from which substantial quantities of oil have been produced, saved and marketed.

8. The agent, R. F. Gibson, for the purpose of obtaining the signature of Mrs. White as grantor, and of Mrs. H. B. Malone as subscribing witness on the co-lessor's agreement, represented to Mrs. White and to the witness, in effect, that the instrument was only a certificate or proof of the heirship of Mrs. White to an interest in the property known as the Adcock estate. The representations as to the nature

and contents of the instrument were false and fraudulent and were made to deceive Mrs. White and the witness and to induce the execution of the instrument. The agent, Gibson, wilfully concealed the true nature and contents of the instrument and induced Mrs. White and the witness to sign without reading it or acquainting themselves with its contents upon the false and fraudulent representations as to its nature and contents. Mrs. White and the witness, to the knowledge of defendant's agent, relied upon such false representations, as they had a right to do, and signed the instrument on the faith thereof, believing that the instrument was, as represented, only a certificate or proof of the heirship or interest of Mrs. White in the Adcock estate.

9. After obtaining the signatures of Mrs. White and Mrs. Malone upon the co-lessor's agreement and on the same occasion, the agent, Gibson, delivered to Mrs. White the draft mentioned in paragraph 4 of these findings, stating at the time, in effect, that it was for the trouble that he had caused. Mrs. White took the draft, retained it in her possession for several days, indorsed and cashed it, all without reading what was on the draft or the writing on the lower part of it, and, in so doing, Mrs. White simply took the word of the agent as to what it contained and what it was for. Mrs. White relied upon the agent's representations, as she had a right to do, and was deceived into believing that the draft was, as falsely represented, for her trouble in signing a paper to establish her heirship in the Adcock property.

10. When the conduct of Mrs. White is judged by what may reasonably be expected from a prudent person of business experience, she was grossly negligent in not reading and understanding what was on the draft given her by defendants' agent before indorsing and cashing it, but the Court finds that Mrs. White was without experience in

such matters and that she did not, in fact, read what was written on the draft, and her neglect in this regard was not such as to amount, in law or in fact, to assent or acquiescence in the co-lessor's agreement or in the writing on the draft.

11. There was no ratification by plaintiffs of the co-lessor's agreement. The plaintiffs did not waive the fraud which the Court finds was perpetrated in obtaining the execution of the co-lessor's agreement, and plaintiffs are not estopped by their conduct or otherwise to assert it to be invalid. Plaintiffs did not release any claims or causes of action for fraud in the procurement of the co-lessor's agreement and did not by any action or otherwise elect to affirm said instrument as a valid or subsisting conveyance. Plaintiffs are not barred by laches or by any other legal or equitable doctrine. The defendant, Union Producing Company, was not an innocent purchaser for value under the co-lessor's agreement.

12. The original plaintiff and intervening plaintiffs had capacity to maintain this suit for cancellation of the co-lessor's agreement for fraud in its procurement and for the other relief prayed for. The Court acquired and has jurisdiction over the parties and subject matter.

13. Walter Moring is not a necessary party to this suit and the decree to be entered cannot affect his rights, if any. As against the defendant, Union Producing Company, the beneficial interest and title of plaintiff and intervening plaintiffs has been established. The Court finds that the beneficial interest and the legal and equitable title to all of the oil, gas and other minerals in, on or under the Minnie E. White interest in the Adcock tract is now owned and vested in Joab Turner Broocks, Trustee for Mrs. Frank Broocks and Mrs. Walter Trout, subject to an oil payment

of $5,000.00 to Mrs. Minnie E. White. Walter Moring never acquired any beneficial or equitable title or interest in this property and, on January 10, 1940, he signed and delivered a deed to A. L. Stevens, conveying to her his record title to the minerals, which is the same title now vested in Joab Turner Broocks, Trustee, as aforesaid.

14. Plaintiffs are entitled to the relief prayed for, that is to say, they are entitled to the decree of this Court canceling and holding for naught the co-lessor's agreement under which defendant claims, as a cloud upon plaintiff's title, and plaintiffs are further entitled to receive and recover of defendant and its assigns 4.8/80 of all of the oil, gas or other minerals heretofore and hereafter taken from the Adcock tract by the defendant, Union Producing Company or its assigns, or the equivalent thereof in cash at market value, less 4.8/80 of the reasonable cost of drilling and completing the wells on said property and the reasonable cost of operating the same for the production of oil. Plaintiffs are further entitled to a strict accounting from the defendant, Union Producing Company, as to said drilling and operation cost cost and as to all of the oil and other minerals produced and saved from the Adcock tract. The first $5,000.00 of recovery shall belong to the plaintiff, Mrs. Minnie E. White, and the remainder shall belong to Joab Turner Broocks, Trustee.

Conclusions of Law.

The Court makes the following conclusions of law:

1. The law of this case is as stated in the opinion of the Circuit Court of Appeals for the Fifth Circuit in Cause No. 10690 on the docket of that Court and reported as Minnie E. White vs. Union Producing Company, 140 F. 2d 176.

2. The defendant, Union Producing Company, was not an innocent purchaser claiming under the instrument here sought to be canceled. The co-lessor's agreement under which defendant claims was procured by the active fraud and deceit of the agent, R. F. Gibson, while acting within the scope of his authority as procuring agent of the defendant, and the defendant is chargeable with the acts of its agent and with knowledge of his fraud.

3. Plaintiffs had the burden to establish their case by clear and convincing evidence, and the Court finds that the plaintiffs met the burden of proof so placed upon them and that the co-lessor's agreement under which defendant claims is void, or at least voidable. The co-lessor's agreement is invalid and is not effective as against plaintiffs or their assigns.

4. The plaintiff, Mrs. White, was negligent in failing to read the co-lessor's agreement before signing it and the draft for $5.00 before indorsing it; but, in view of the existence of actual fraud in fact of defendant's agent in procuring the co-lessor's agreement, and in view of the false and fraudulent representations made by defendant's agent as to the nature and contents of the co-lessor's agreement and as to what the draft contained and what it was for, negligence is no defense to the relief sought by plaintiffs. The negligence of Mrs. White was not such as to amount to proof or assent or acquiescence by her in the co-lessor's agreement under which defendant claims.

5. The plaintiff, Mrs. White, had the right to rely upon the representations made to her by defendant's agent as to the nature and contents of the paper that she was asked and induced to sign, and to accept the statements of the agent as true without inquiry, although the means of correct information were within reach. Mrs. White had the right

to take the word of defendant's agent as to what the draft for $5.00 contained and what it was for.

6. There was no ratification by plaintiffs of the co-lessor's agreement. The plaintiffs did not waive the fraud which the Court has found was perpetrated in obtaining the execution of the co-lessor's agreement, and plaintiffs are not estopped by their conduct, or otherwise, to assert its invalidity. Plaintiffs did not release any claims or causes of action for the fraud in the procurement of the co-lessor's agreements and did not, by any action or otherwise, elect to affirm said instrument as a valid and subsisting conveyance. Plaintiffs are not barred by laches or any other legal or equitable doctrine.

7. The plaintiff, Mrs. White, as well as the intervening plaintiffs, are proper parties to maintain this suit. The court acquired and has jurisdiction over the parties and subject matter. Walter Moring was not a necessary party.

8. The plaintiffs have established their beneficial interest and legal title, as against the Union Producing Company and its assigns, to 4.8/80 of all the oil, gas and other minerals in, on and under the Adcock tract.

9. Plaintiffs are entitled to the relief prayed for, that is to say, they are entitled to the decree of this Court canceling and holding for naught the co-lessor's agreement under which defendant claims as a cloud upon plaintiffs' title, and plaintiffs are further entitled to receive and recover of defendant and its assigns 4.8/80 of all of the oil, gas or other minerals heretofore or hereafter taken from the Adcock tract by defendant or its assigns or the equivalent thereof in cash at market value, less 4.8/80 of the reasonable costs of drilling and completing the wells on said property and the reasonable cost of operating the

same for the production of oil, all as their interests appear and as stated in paragraph 13 of the Court's findings of fact. Plaintiffs are also entitled to a strict accounting from defendant as to all oil produced and saved and as to the cost of drilling, completing and operating said wells.

Judgment may be entered accordingly.

This the 5th day of March, 1945.

(S.) S. C. MIZE,
District Judge.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 11,432.

Union Producing Company, Appellant,
versus
Minnie E. White, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Mississippi.

(February 14, 1946.)

(153 F. (2) 856.)

Before HOLMES, WALLER, and LEE, Circuit Judges.

LEE, Circuit Judge: Mrs. Minnie E. White brought suit in the court below against the Union Producing Company for the cancellation of a certain oil, gas, and mineral lease, or co-lessor's agreement, of July 31, 1939, covering an undivided 4.8-acre interest in eighty acres known as the Adcock Estate Land, located in Yazoo County, Mississippi.

Mrs. White alleged that one R. F. Gibson, acting as the agent for Union Producing Company, had induced her to sign, without reading, a document, on his representation that it was a certificate or affidavit that she was the sole heir of a deceased daughter; and she further alleged that some months later she learned that the document was a co-lessor's agreement purporting to lease to the Union Producing Company her interest in the eighty-acre tract. About two and one-half months after the execution of the co-lessor's agreement Mrs. White conveyed her entire interest in the eighty acres by quitclaim deed to one Walter Moring, who by deed dated January 10, 1940, purportedly conveyed the interest to one A. L. Stevens. It is contended that Walter Trout, the employer of Moring, in the absence of Moring, bought Mrs. White's interest for certain members of the Stevens family and named Moring the grantee, as a mere conduit, in the deed from Mrs. White; that Moring later conveyed to A. L. Stevens (now Mrs. Walter Trout); and that she conveyed to Joab Turner Broocks. Joab Turner Broocks allegedly is holding title in trust for Mrs. Frank Broocks and Mrs. Walter Trout. A. L. Stevens (Mrs. Walter Trout), Joab Turner Broocks, and Mrs. Frank Broocks, the last two claiming under and out of A. L. Stevens, intervened in this suit and joined Mrs. White in the action to set aside the co-lessor's agreement. The plaintiff, Mrs. White, is a citizen of Mississippi, and the defendant, Union Producing Company, a Delaware corporation; the intervenors are citizens of Texas, Louisiana, and Mississippi. At the time the suit was brought Moring was a citizen of Texas but was serving in the Armed Forces outside the jurisdiction of the court.

After a trial on the merits the court below directed a verdict on the ground that, if one assumed that fraud was practiced by the Union Producing Company's agent on Mrs. White in procuring the co-lessor's agreement, the

gross negligence of Mrs. White in failing to read that agreement and a check [1] which specifically set forth the nature of the agreement, precluded her from claiming that the agreement should be set aside for fraud. On appeal by Mrs. White and the intervenors from the judgment entered on the verdict, we reversed and remanded the cause,[2] hold *inter alia* (1) that this was an equitable action and should have been tried by the court and not by a jury; (2) that, under the Mississippi law which governed, contributory negligence is not a defense to an action based on fraud; (3) that Walter Moring was not an indispensable party to the action; and (4) that plaintiff and intervenors introduced ample evidence, if believed, to support a finding of fraud. After the case was sent back to the district court, the intervenors amended their petition to ask for a money judgment based on an accounting for their pro rata share of production less their pro rata share of costs.[3] Following the second trial, the district court found that fraud was practiced by the agent of the Union Producing Company on Mrs. White. It held (1) that the co-lessor's agreement was invalid, null, and void; and (2) that the intervenors were entitled to receive and recover from the Union Producing Company 4.8/80 of all the oil heretofore and hereafter taken from the land by the Union Producing Company, less 4.8/80 of the reasonable cost of drilling and completing the wells on said property and the reasonable cost of operating them for the production of oil; and (3) that Mrs. White was entitled to $5,000, which was part of the consideration to be

1 This check was for $5.00, the amount of the cash consideration set out in the co-lessor's agreement. On the check was the following explanation: "Consideration for execution of oil & gas lease on W½ North West of Section 19—T 10 N R 2 W Yazoo Co Miss, dated July 31, 1939 from Minnie E. White to Union Producing Co. (Co-lessors agreement)."

2 140 F. 2d 176.

3 After Mrs. White parted with title to the land, but prior to the filing of this suit, a well was brought in on the property which produced oil in paying quantities.

paid her from production for the conveyance to Moring of her interest in the land, and that the intervenors were entitled to the balance. The judgment cancelled the co-lessor's agreement and decreed plaintiff and intervenors entitled to receive and recover from the Union Producing Company 4.8/80 of all oil, gas, and other minerals heretofore and hereafter produced from the property, less 4.8/80 of the reasonable cost of drilling, completing, and operating the wells thereon, in the proportion to be fixed by final judgment. The court retained jurisdiction for the purpose of taking and stating an account between the parties, and entering the final money judgment. On final hearing on the accounting the court entered judgment against the Union Producing Company for $42,294.20, $37,137.78 in principal and $5,156.42 in legal interest, of which total sum of $5,000 was awarded to plaintiff and the balance to the intervenors. The Union Producing Company appealed.

Of the issues raised on this appeal all except two were disposed of in our former opinion. The excepted two issues are: (1) Is Walter Moring, who testified in his deposition that the deed to A. L. Stevens was a forgery, an indispensable party to the suit for an accounting? (2) Is the evidence sufficient to show fraud on the part of Union Producing Company in procuring the co-lessor's agreement under Mississippi law which requires that such evidence be clear and convincing?

Appellant urges that Walter Moring is an indispensable party to the accounting, and that if it pays the plaintiff and the intervenors for their interest in the oil, success by Walter Moring in attacking the deed to A. L. Stevens, that by deposition he stated was a forgery, would subject it to a claim by him for the same interest.

The subjection of appellant, however, to a possible double liability does not make Walter Moring an indispensable party. In *Williams v. Bankhead*, 86 U. S. 563, 22 L. Ed. 184, the Supreme Court said:

> "The other ground of appeal, namely, that the widow was an indispensable party, presents a more serious question. On the one hand it is said that, not being a party, her rights were not concluded; and that the only inconvenience arising from proceeding with the case without her was the double liability to which Bolton and the administrator of Branch became exposed by having to pay her and Bankhead both, under contrary decrees of different courts. The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant.

"In the present case, if the question were one of mere personal liability on the part of Bolton, McNiell and Williams, it might have been admissible to proceed without making the widow of Branch a party, inasmuch as she was not a resident of Arkansas, and could not at the time be made a party in the Circuit Court without being served with process in the district of Arkansas or voluntarily appearing in the suit. * * * But this is not a case of mere personal liability. It concerns the disposal of a specific fund, in which the widow claims an interest. If the sum of $3,666.66 mentioned in the decree is not paid, the plantation is directed to be sold in order to raise the amount of Bankhead's claim. And this plantation is in the possession of the widow by her tenants. She is to receive the rents and profits thereof until her claim is satisfied by the payment of the said sum of $3,666.66, and the interest due thereon, awarded her by the Desha County Court. Her interests, therefore, are directly affected by the decree.

"Under these circumstances we think that she was an indispensable party."

An amount due by appellant for the oil (the *res*) has not been deposited in the registry of the court, and the adverse claimants have not been cited to establish their interest therein. If such were the case, Moring would be an indispensable party. A suit for an accounting is not an action over the *res* but a personal action; in such action Moring is not an indispensable party.[4]

The record reveals that one of the intervenors, Joab Turner Broocks, a resident of Louisiana, had in the court below asked in a suit pending at the time of the trial of

[4] Cf. "Indispensable Parties," 9 Encyclopedia of United States Supreme Court Reports, III, A, 2, b, page 41.

this cause in that court, for an adjudication of the validity of the alleged conveyance from Moring to Stevens. The record also reveals that Joab Turner Broocks is prosecuting the suit for the benefit of intervenors. By filing such a suit intervenors have taken the position at least that Moring's claim is a cloud upon their title. Compulsion of appellant to pay the intervenors before adjudication of the controversy between Joab Turner Broocks and Moring in the independent action would subject the Union Producing Company to a possible hardship. To avoid possible hardship the court below should have stayed the proceedings in this suit until the action brought by Brooks against Moring had been finally adjudicated, or should have consolidated the two suits for trial. A stay until the Broocks-Moring suit was adjudicated would have imposed less hardship upon the intervenors and Mrs. White, who claims a modest interest in the proceeds of the accounting, than the ultimate possible hardship upon the appellant. By a consolidation of the two suits under Rule 42(a) of the Federal Rules of Civil Procedure, all parties would be bound by the final judgment, and no unjust hardship would result.

On the first appeal we said that the plaintiff and the intervenors had introduced ample evidence, if believed, to support a finding of fraud. The Union Producing Company urges that on remand the court below mistakenly thought that this statement indicated an opinion that fraud was present. As support to that contention, it points to the reason given by the court below in overruling its motion to set aside the court's finding that appellant's agent practiced fraud in acquiring the co-lessor's agreement from Mrs. White. That reason is: "The conclusion of law I think is required to be made by the mandate of the Circuit Court of Appeals in its decision in this cause." We did not intend to indicate or suggest

any opinion whatsoever as to whether fraud was or was not present.

In an equitable proceeding the court should as far as possible avoid a final determination inconsistent with equity and good conscience. That this may be accomplished, we shall remand the cause in order that the suit by Broocks against Moring, pending in the court below, may be consolidated with this suit. In remanding the cause, we leave open the question of fraud: On that question the court below may pass again. If the court below in finding fraud was not influenced by the statement of this court in our first opinion, it may re-instate its findings of fact. If our statement in the first opinion indicated to the court below that we thought that fraud was present, then this opinion should remove that impression and leave the court free to make findings on the issue of fraud strictly in accord with its own view of the evidence heretofore taken or that evidence supplemented in further trial.

The judgment appealed from is reversed, and the cause is remanded for proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

WALLER, Circuit Judge, specially concurring:

I concur in the reversal and remanding of this case on the grounds stated, but I further believe that the evidence in this case fails to measure up to that clear and convincing standard necessary to establish fraud.

HOLMES, Circuit Judge, dissenting:

On the former appeal we held that Moring was not an indispensable party to this suit, and I agree that he did not become such by reason of the amended complaint that prayed for an accounting. Therefore, I cannot see any reason to consolidate this suit with that of Broocks v. Moring or to stay it until the latter is adjudicated. There are numerous reasons against this procedure, one of which is that it is now too late to invoke a rule[1] that was intended "to avoid unnecessary costs and delay."

This suit was filed September 22, 1941; Broocks v. Moring was filed September 27, 1941. To consolidate the two after they have been pending four-and-a-half years, tried twice, and appealed twice, would promote rather than avoid delay, and would impose costs and expenses upon appellees. Without doing this, equity has ample power to protect a litigant from the "possible hardship" of a double payment.

I find no basis for the contention that the court below mistakenly thought its finding of fraud was required by the mandate of this court. The court said that its conclusion of law was so required; and clearly that is what the court meant. As to the findings of fact, it would be hard to improve upon the clarity of the Judge's statement, p. 50 of record: "I am of the opinion that the finding of fact heretofore made is fully supported by the record and fully covers all controverted points." In the next paragraph, after he had left the subject of fact-finding, and when he was referring to conclusions of law, the Judge said: "The conclusion of law I think is required to be made by the mandate of the Circuit Court of Appeals in its decision in this case."

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[1] Rule 42 of Federal Rules of Civil Procedure. Cf. 28 U. S. C. A. 734; Revised Statutes, Sec. 921; Act of July 22, 1813, c. 14, Sec. 3, 3 Stat. 21. So far as this statute differs from the rule, the statute is modified to conform to the rule.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 11,432.

Union Producing Company, Appellant,
versus
Minnie E. White, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Mississippi.

On Petition for Rehearing.

(March 22, 1946.)

(153 F. (2) 859.)

Before HOLMES, WALLER, and LEE,
Circuit Judges.

BY THE COURT: IT IS ORDERED that the petition for rehearing in the above numbered and entitled cause be, and it is hereby,

DENIED.

HOLMES, Circuit Judge, dissenting:

I take it that this reversal is not on the ground that the trial court misconstrued the mandate or opinion of this court. In the light of the first letter-opinion of the trial judge, the apprehended mistake as to the mandate has disappeared like mist before the sun. If our attention had been directed to the first letter instead of the second, it is inconceivable that the majority would have had any apprehension on the subject. The following is a brief excerpt from the judge's first opinion: "I have weighed the evidence from all angles and am convinced that it shows by clear and convincing proof that the agent of the company was guilty of fraud. . . . I have therefore reached the conclusion from all the testimony and reasonable inferences that plaintiff is entitled to judgment."

No reversible error in the record is discernable, but our decision puts the trial court in error for doing what this court directed it to do, what the appellant in writing moved it to do, and what all parties expressly consented that it should do, viz., proceed to trial and final judgment on the merits. A stronger case of waiver is difficult to conceive. A motion to stay proceedings is a matter in abatement and comes within Rule 12(g) and (h) of the Federal Rules of Civil Procedure.

This case has been tried twice by the same judge and on the same evidence. On the first trial, the court below decided for the defendant, and rendered judgment dismissing the complaint. That judgment was reversed by this court and a new trial ordered. Thereupon, with the consent of all the parties, the same record was submitted to the same judge for final decision on the merits. Not one word of additional testimony was offered, and judgment was rendered for the plaintiffs.

We have, then, a case where both sides were ready for trial and consented in writing for the court to proceed to final judgment. There is nothing in the record to indicate that anyone desired a consolidation or a stay. It is not necessary to have a consolidation in order to grant a stay. There is already a stay in *Broocks v. Moring*. It is not necessary to remand this case for a stay to be granted. This court, on appeal, has the same right to grant a stay as the district court had when the case was before it. We have jurisdiction to grant a stay in this case, but we have no jurisdiction to terminate the stay in force in *Broocks v. Moring*, because that case is not before us. We can give directions to the court below where there is appellate jurisdiction, not in other cases pending in the district court.

What complications involve us if we try to do justice according to our idea of what is right though not within the framework of the law!

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 11,432.

Union Producing Company, Appellant,
versus
Minnie E. White, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Mississippi.

On Second Petition for Rehearing.

(June 18, 1946.)

(156 F. (2) 58.)

Before HOLMES, WALLER, and LEE,
Circuit Judges.

BY THE COURT: It having been brought to our attention that the case of *Broocks v. Moring,* to which reference was made in our original opinion, since the filing of that opinion, has been disposed of in the court below adversely to Moring's claim, and that fact being conceded by the parties hereto, it is ordered that the rehearing prayed for in the second application therefor be granted and that this case stand resubmitted on briefs heretofore filed and on such briefs as the parties hereto see fit to file on or before August 15, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 11,432.

Union Producing Company, Appellant,
versus
Minnie E. White, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Mississippi.

On Rehearing.

(September 17, 1946.)

Before HOLMES, WALLER, and LEE,
Circuit Judges.

BY THE COURT: The facts and issues in this cause are fully set out in opinions heretofore reported.* In our original opinion on this appeal we said:

> "Of the issues raised on this appeal all except two were disposed of in our former opinion. The excepted two issues are: (1) Is Walter Moring, who testified in his deposition that the deed to A. L. Stevens was a forgery, an indispensable party to the suit for an accounting? (2) Is the evidence sufficient to show fraud on the part

* 140 F. 2d 176; 153 F. 2d 856; 156 F. 2d 58.

> of Union Producing Company in procuring the co-lessor's agreement under Mississippi law which requires that such evidence be clear and convincing?"

Being of the opinion that the Court below, to avoid possible hardship (payment of asserted interest in production of oil from land to each of two adverse claimants), "should have stayed the proceedings in this suit until the action brought by Broocks against Moring had been finally adjudicated, or should have consolidated the two suits for trial," we reversed and remanded the case so that the suit by Broocks, *et al.*, against Moring, then pending in the court below, could be consolidated with this suit. In remanding the cause we left open the question of fraud. In granting a rehearing, 156 F. 2d 58, we said:

> "It having been brought to our attention that the case of *Broocks vs. Moring*, to which reference was made in our original opinion, since the filing of that opinion, has been disposed of in the court below adversely to Moring's claim, and that fact being conceded by the parties hereto, it is ordered that the rehearing prayed for in the second application therefore be granted and that this case stand resubmitted on briefs heretofore filed and on such briefs as the parties hereto see fit to file on or before August 15, 1946."

As the case now stands, the only question before us is, "Is the evidence sufficient to show fraud on the part of Union Producing Company in procuring the co-lessor's agreement under Mississippi law which requires that such evidence be clear and convincing?"

No new evidence bearing on this question was introduced by the parties when the case was heard by the

court below after remand on the first appeal, hence the entire evidence on this question was before us on that appeal. On consideration of that evidence we then held that ample evidence was introduced, if believed, to support a finding of fraud. After the second trial, the court below found that fraud was practiced by the agent of the Union Producing Company on Mrs. White, held that the co-lessor's agreement executed by her was invalid, null, and void, and rendered judgment cancelling said agreement.

Under Rule 52(a) of Rules of Civil Procedure, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses, we cannot say that its finding that fraud was practiced is clearly erroneous.

The judgment heretofore entered on this appeal is set aside, and the judgment appealed from is

AFFIRMED.

WALLER, Circuit Judge, Dissents.

Miss. Code 1930, Sec. 404 (Miss. Code of 1942, Sec. 1324):

> "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court

to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

Miss. Code 1930, Sec. 505 (Miss. Code of 1942, Sec. 1448):

"The assignee of any chose in action may sue for and recover on the same in his own name, if the assignment be in writing. In case of a transfer or an assignment of any interest in such chose in action before or after suit brought, the action may be begun, prosecuted and continued in the name of the original party, or the court may allow the person to whom the transfer or assignment of such interest has been made, upon his application therefor, to be substituted as a party plaintiff in said action. If in any case a transfer or assignment of interest in any demand or chose in action be made in writing before or after suit is filed, to an attorney or firm of attorneys, appearing in the case, it shall be sufficient notice to all parties of such assignment or transfer, if such assignment or transfer be filed with the papers in said cause, and such attorney or attorneys shall not be required to be made parties to said suit."